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No. 1265

In the

Supreme Court of the United States

OCTOBER TERM, 1968

ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Manufacturing Company; and ALPHA OF TEXAS, INC.; and CONTINENTAL ELECTRONICS MANUFACTURING COMPANY; and ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Systems, Inc.; and CONTINENTAL ELECTRONICS SYSTEMS, INC. and LING ELECTRIC, INC.; and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA of the Use of F. E. Robinson Co. of N. C., Inc. and F. E. Robinson Co. of N. C., Inc.

Respondents.

LING ELECTRIC, INC.,

Petitioner,

v.

FEDERAL INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

R. M. GINSBERG and
JACK D. EADES
2424 First National Bank Building
Dallas, Texas 75202
Attorneys for Petitioners.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

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No. .....

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FEDERAL INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above companion cases on December 4, 1968 and January 15, 1969.

OPINIONS IN THE COURTS BELOW

The opinion of the District Court for the Eastern District of North Carolina Washington Division, covering both cases tried in a common trial, is printed in the Appendix hereto and is reported at 273 F. Supp. 758.

The opinion of the Court of Appeals for the Fourth Circuit in Robinson v. Alpha-Continental, et al, is printed in the Appendix hereto and is reported at 404 F. 2d 343. The opinion of the Court of Appeals for the Fourth Circuit in Ling Electric, Inc. v. Federal Insurance Co. is printed in the Appendix hereto and is not yet officially reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals for the Fourth Circuit in Robinson v. Alpha-Continental, et al, was made and entered on December 4, 1968, and a copy thereof is appended to this petition. On December 18, 1968, the Court Ordered that the time to file the petition for rehearing was extended to January 7, 1969, and on February 11, 1969 entered its Order denying rehearing in that case.

The judgment of the Court of Appeals for the Fourth Circuit in Ling Electric, Inc. v. Federal Insurance Co. was made and entered on January 15, 1969, and a copy thereof is appended to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a labor subcontractor on a government construction project has the unilateral right to repudiate and abandon his subcontract, contending that he is due money for unapproved changes thereto, and recover on *quantum meruit* whenever the government contacting officer does not act expeditiously enough to suit him.

2. Whether a labor subcontractor, performing under a subcontract on a government construction project, is obligated to proceed with work in accordance with the determinations of the prime contractor where his contract incorporated such obligation contained in the contract of his subcontractor.

3. Whether a claim by a labor subcontractor on a government construction project for alleged change order work can be allowed which the government found to be included in the work required within the scope of the original contract.

4. Whether the provisions of a contract between a subcontractor and a prime contractor (incorporated by reference into a labor subcontract) by which the prime contractor conferred in advance the right to litigate under the disputes clause in the name of the prime, is a legally enforceable contractual provision prohibiting a labor subcontractor from suing his subcontractor until first exhausting disputes procedures.

5. Whether a performance bond surety on a labor subcontract is excused from completing the contract after abandonment by its principal where the principal was held liable for moneys charged back to the subcontractor on work done by the principal.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Miller Act, 40 U.S.C. 270b, reads as follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him; . . ."

STATEMENT OF THE CASE

These suits under the Miller Act arise from the abandonment of a labor subcontract by F. E. Robinson Co. of North Carolina, Inc. in North Carolina on September 24, 1962. The basic facts which are not in dispute are as follows:

On or about November 10, 1960, United States Information Agency of the United States Government entered into a written contract with Alpha-Continental, one of the pe-

titioners herein, as prime contractor for the performance of Contract No. IA-7454. On or about the 30th day of March, 1961 Alpha-Continental entered into a contract with Ling Electric, Inc., one of the petitioners herein, as electrical subcontractor for the performance of Contract No. IA-7454.

On March 30, 1961 Ling Electric, Inc. entered into a labor subcontract with respondent herein for the furnishing of all necessary labor, related payroll expenses, tools and equipment necessary for a complete installation as set forth in contract No. IA-7454. The labor subcontractor agreed under the contract to be bound by all the contract documents, plans and specifications, general and special conditions, and in particular, Article XL of the contract between Ling and Alpha-Continental, specifically incorporating all applicable provisions required by federal laws, executive orders or regulations governing government contracts. During the course of the contract, the labor subcontractor submitted various requests for approval of various items which the labor subcontractor alleged to be outside the scope of the contract. Such requests were processed and forwarded for approval, through the proper channels, by the contracting officer assigned to the project by the government agency.

On July 11, 1962, a meeting between Ling and Robinson was held in Greenville, North Carolina, at which all pending change orders were reviewed and tentative approval given for certain pending change orders for which payment was made. Other requests for change orders were still pending for action by the government contracting officer. Be-

tween July 11, 1962 and September 24, 1962 no approvals were issued by the government contracting officer.

In August, 1962, Ling requested Robinson to formally submit certain other requests for change orders with the express agreement that such requests would be processed later in the job. On September 5, 1962, Robinson directed that such requests be processed or submitted for approval immediately, although contrary to the prior agreement. Only seventeen days later Robinson elected to abandon the contract, asserting that Ling owed Robinson for the requested change orders even though not approved by the government contracting officer nor established as being outside the scope of contract.

During the trial Robinson offered no evidence to show that the work for which Robinson claimed payment to be due was not covered by the plans and specifications or the general and special conditions of the contract.

Some months after Robinson abandoned the contract, some of the requested change orders were approved and some were disapproved. All monies received for approved change orders were applied to the cost of completion of the contract, and credited to the amounts claimed to be due from Federal Insurance Co., the company that bonded Robinson's performance.

During the course of the construction certain items of extra work were required of the labor sub-contractor and all such items of extra work were paid to the labor subcontractor except such items as were in dispute.

On July 11, 1962 at a meeting between Robinson and Ling, all invoices for alleged extra work were reviewed and classified. Certain invoices were approved for payment. Certain invoices had been paid but such payment was disputed. Robinson extended a credit to Ling in the amount of $3,000.00 as a refund for the payments theretofore made. A group of invoices for certain work alleged to be within the scope of the contract were held in abeyance and no payment was made. The money paid to Robinson as a result of said meeting was paid and accepted by Robinson with the understanding and agreement that the disputed invoices would not be paid until a determination had been made by Alpha-Continental and/or Voice of America respecting whether such work was within the scope of the contract.

Between July 11, 1962 and September 24, 1962 it was undisputed that no determination had been made resolving the issues with respect to the disputed invoices for extra billings.

During the course of the performance of the contract the United States Information Agency requested the prime contractor to furnish the government an estimate of the cost of accelerating the contract, since it appeared the completion date originally set forth in the contract would not be met. Ling requested Robinson to submit an estimate of what its costs would be should such acceleration be instituted. It was undisputed that no acceleration had ever been authorized by the United States Information Agency. Robinson submitted an invoice for alleged speed-up cost after abandoning the job, as a part of its claim.

Prior to abandonment of the contract by Robinson, Robinson acknowledged that its costs for alleged speed-up was a claim item to be submitted to the government Contracting Officer. No event occurred on or prior to September 24, 1962 entitling Robinson to payment for such alleged speed-up on the date Robinson abandoned the contract. No evidence was offered by Robinson to show what portion of the amounts alleged to be due were attributable to speed-up and what portion of such alleged costs were incurred by reason of Robinson failing to properly staff the job for the work which it undertook under the base contract.

It was admitted that a portion of the amounts claimed by Robinson to be due on September 24, 1962 was for costs incurred by Robinson in correcting defective work rejected by the government inspector. Under the payment schedule set forth in Robinson's contract with Ling, Robinson was entitled to receive all of its payroll expense, plus ten (10%) per cent until ninety-five (95%) per cent of the adjusted contract price had been paid. When that point had been reached, Ling requested approval of Robinson's bonding company to disburse the retainage under the contract, but was refused permission. Ling requested, and obtained, permission from Federal to make certain advances on pending change orders and received approval for such. Ling requested permission of the bonding company to make lump sum advances to Robinson, in the event Federal would agree that if Robinson was overpaid, Federal would be responsible for reimbursement to Ling. This permission was refused. As of the date Robinson abandoned the contract the total monies

paid to Robinson exceeded the amount of the verified payrolls submitted by Robinson, which payrolls were required to be submitted to the government contracting officer.

Following Robinson's abandonment of the contract, Ling made demand upon Federal to honor its obligations under the bond and complete the contract. Federal refused so to do. Ling, being likewise bonded to the prime contractor, proceeded to complete the contract in accordance with its contractual obligations to Alpha-Continental and the United States Information Agency at an additional cost of $109,388.75.

On December 18, 1962, Ling filed suit against Federal Insurance Company in the United States District Court for the Northern District of Texas for damages for breach of Federal's obligation to complete said contract in accordance with its bond, crediting all sums collected by Ling for work performed by Robinson prior to its abandoning the contract.

On May 7, 1963, Robinson filed suit against Alpha-Continental and Ling in the United States Court for the Eastern District of North Carolina under the Miller Act.

On May 28, 1963, the United States District Judge for the Northern District of Texas transferred the case of *Ling v. Federal* to the Eastern District of North Carolina. The two cases were consolidated for trial and were likewise consolidated for hearing on appeal.

On September 8, 1967 the United States District Court for the Eastern District of North Carolina awarded judg-

ment to Robinson for $117,169.53 over and above the sum of $382,471.52 previously paid Robinson by Ling, and allowed Ling recovery of $3,926.54 from Federal for backcharges by the prime against Ling. On appeal, the Court of Appeals affirmed by per curiam opinions.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the Miller Act so as to disrupt and place in jeopardy all government contracting procedures. It substitutes a cause of action on quantum meruit in derogation of the provisions of an expressed contract. It justifies with impunity the actions of any financially distressed labor subcontractor in abandoning work on a nationally important government construction project based upon the labor subcontractor's unilateral determination that he is due money for work outside the scope of the base contract for disputed and unapproved changes thereto and extras. It makes impossible any reliance upon the provisions and safeguards written into the standard form of government contracts by the government or any prime or subcontractor ostensibly bound thereby.

Either the decision below is in conflict with the decisions of *Jefferson Construction Co. v U. S.*, 283 F. 2d 265 (1960, 1 Cir., cert. denied 5 L. Ed. 2d 744), *St. Paul-Mercury Indemnity Co. v. U. S.*, 238 F. 2d 917 (1956, 10 Cir.), and *U. S. v. United Enterprises, Inc.* 226 F. 2d 359 (1955, 5 Cir.) or, if it is not so in conflict, the "issues of far-reaching importance" left undecided in those cases must be faced. In either event, this Court should grant review.

1. The decision below imposes an obligation upon a subcontractor to pay his labor subcontractor for disputed items of work *both admittedly and allegedly outside the scope* of the bonded contract, within a reasonable time unilaterally determined by the labor subcontractor. The failure of the subcontractor to meet this unusual obligation justifies a labor subcontractor to abandon the bonded contract and walk off the job.

Here the court below found that on the day of abandonment Ling owed Robinson $38,446.47 for alleged *unpaid change order work* (installing *corona shields and stress cones* not called for in the base contract). The determination that this work was not covered by the base contract and was then owing was unilaterally made by Robinson. The immediate processing of the pending change orders, which if then approved would have confirmed this determination, was demanded by Robinson 19 days before he abandoned the work. These change orders were later processed to conclusion in accordance with the normal government procedures and agreements of the parties and were disapproved because the government found that such work was within the contract requirements and not a recoverable claim item. Ling's refusal to pay Robinson for this work at that time was vindicated by the subsequent proceduces and decisions, but the court below nevertheless held that Robinson was justified in refusing to continue work on the project for the failure "to make payment for a large portion of the extra work, change orders and speed up". The trial court also found that $21,851.06 was owing Robinson on the day of

abandonment for unapproved and *disputed extra billings* upon Robinson's unilateral determination that *bonding and grounding* was outside the scope of the contract, and that $69,927.98 was owing by Ling for *disputed speed-up work* ordered by the government.

The trial court observed that: "If all Government projects, are carried on in the same manner as this project, it is a wonder we do not have even more litigation in this field. The way in which this contract was handled was a breeding ground for litigation from the very beginning." Petitioners herein submit that substantially all Government projects are carried on in substantially the same manner as this project, in accordance with prescribed regulations and if even more litigation in this field is to be avoided, the basic rights, duties and obligations of subcontractors in completing standard government contracts must be more clearly defined by the Supreme Court. The right of a labor subcontractor to decide unilaterally that he is due money for work outside the scope of a government contract and abandon the project, presents a grave and important question, the settlement of which is certainly in the public interest.

2. The decision of the court below involves a direct conflict with decisions of the Court of Appeals in the First, Fifth and Tenth Circuits. In *Jefferson Construction Co. v. U. S.*, 283 F. 2d 265 (1960, 1 Cir., cert. denied 5 L. Ed. 2d 744), it was held that in the absence of a showing of compliance with and performance under the subcontract the Miller Act does not substitute or furnish a cause of action on a quantum meruit in derogation of the provisions of an express

contract, citing many cases. In *U. S. v. United Enterprises*, 226 F. 2d 359 (1955, 5 Cir) the court held that under the terms of a subcontractor's agreement with the government contractor, the subcontractor was bound by the decisions of the government engineer as to what the prime contract required, and the engineer's interpretation of the original contract was conclusive on the subcontractor, citing many cases.

The decision of the court below held that there never was any agreement between Alpha-Continental, Ling and Robinson that Robinson should await approval of the Government and/or Alpha-Continental before performing or being paid for performing change order work, extra work or speed-up work, despite the provisions of the contract documents relating to determinations of work required within the scope of the contract, changes thereto and extras, and who would make the decisions.

In *St. Paul-Mercury Indemnity Co. v. U. S.*, 238 F. 2d 917 (1956, 10 Cir) the court rejected an additional claim in excess of $35,700.00 for "miscellaneous services" furnished the prime contractor in the performance of the prime contract saying that the total of the items cannot be established by striking a book balance between the prime and the sub for all of their activities, including those admittedly outside the contract; liberality of statutory construction is not a substitute for burden placed upon claimant to prove that labor and materials making up his claim under Miller Act were furnished in prosecution of the work, and there must be

some reliable evidence from which it can reasonably be inferred that labor and materials went into prosecution of the bonded job, and conjecture or guesswork is not enough.

The court below, in determining the items unpaid and the rights of the parties on the date of Robinson's abandonment of the job, reconstructed a book balance on the entire "status of the account" from inception to abandonment, including those activities admittedly outside the bonded contract. Had the court below followed the standards announced by the First, Fifth and Tenth Circuit opinions above cited, it would have been apparent that on September 24, 1962 when Robinson abandoned the job: (1) all periodic payments for work within the scope of the contract had been paid, (2) all sums then due Robinson on approved and valid change orders to the contract had been paid, (3) no sums were then due and owing Robinson for extra work outside the scope of the contract, (4) no sums were then due and owing for speed-up work, and (5) Ling was entitled to recover from Robinson's surety, which had refused to guarantee repayment of advances against unapproved change orders and to complete the job, the $109,388.75 additional cost required to complete Robinson's labor subcontract.

If the decision below is not review by the Supreme Court and reasonable and controlling guidelines established, the Miller Act will have been so emasculated that all standard government construction contracting will be disrupted and placed in jeopardy. Henceforth, all government subcontrac-

tors will be caught between the upper and nether millstones with no remedy to make themselves whole or to require compliance by disgruntled labor subcontractors with solemn and customary contractual obligations.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

R. M. GINSBERG and
JACK D. EADES

R. M. Ginsberg

Jack D. Eades

Attorneys for Petitioners.

2424 First National Bank
Building
Dallas, Texas 75202

PROOF OF SERVICE

I, Jack D. Eades, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that all parties required to be served have been served in compliance with paragraphs 1 and 3(b) of Supreme Court Rule 33 by depositing a true copy of the foregoing Petition for a Writ of Certiorari in a United States mail box, with first class air mail postage prepaid, addressed to each of Messrs. Ray Rankin, 509 Law Building, Charlotte, North Carolina 28202, and John H. Anderson, 806 Wachovia Bank Building, Raleigh, North Carolina 27602, counsel of record for Respondents, this 11th day of April, 1969.

Jack D. Eades

APPENDIX

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 12,277

United States of America for the
Use of F. E. Robinson Co., of N.C.;
and F. E. Robinson Co. of N.C.;
Inc.,

Appellees,

versus

Alpha-Continental, a Joint Venture,
etc., et al.,

Appellants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Washington.
John D. Larkins, Jr., District Judge.

(Argued October 30, 1968. Decided December 4, 1968.)

Before SOBELOFF and BRYAN, Circuit Judges, and
HUTCHESON, District Judge.

R. M. Ginsberg and Jack D. Eades (W. W. Speight and
W. H. Watson on brief) for Appellants, and John H.
Anderson and Ray Rankin for Appellees.

PER CURIAM:

Under the Miller Act, 40 USCA 270a-270b, the District Court gave judgment in favor of the sub-subcontractor F. E. Robinson Co. of N.C., Inc. against the general contractor, joint venturers composing Alpha-Continental, and its surety, and the subcontractor, for labor furnished during 1961 and 1962 in the construction and installation of radio facilities at Greenville, North Carolina for the United States Information Service.

The order of the District Court now on review evolved from a trial without a jury. Searching and comprehensive exploration of the evidence is evinced by the discussion, findings and conclusions embodied in the opinion of the judge, reported as United States v. Alpha-Continental, 273 F. Supp. 758 (E.D.N.C. 1967). In a close look at the record we discover no clear error in the facts as resolved and refined by him from the evidence, F.R. Civ. P. 52(a), nor do we observe mistake of law. The appeal tenders no premise for reversal of the judgment; we affirm on the findings and for the reasons stated in the opinion filed in the case.

Affirmed

United States Court of Appeals
FOR THE FOURTH CIRCUIT

No. 12,278

Ling Electric, Inc.,

Appellant,

versus

Federal Insurance Company,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Washington. John D. Larkins, Jr., District Judge.

(Argued October 30, 1968 Decided January 15, 1969 .)

Before SOBELOFF and BRYAN, Circuit Judges, and HUTCHESON, District Judge.

R. M. Ginsberg and Jack D. Eades (W. W. Speight and W. H. Watson on brief) for Appellants, and John H. Anderson and Ray Rankin for Appellee.

PER CURIAM:

This appeal was heard along with No. 12,277 in this court. The trial in the instant action (No. 523 in the District Court) was consolidated or conducted simultaneously with the action (No. 518 in the District Court) which is embraced in appeal No. 12,177. With the exception of a tort claim, the two cases involved the same issues and rested on the same evidence.

The District Judge treated both cases in a single opinion, United States v. Alpha-Continental, 273 FSupp 758 (E.D.N.C. 1967), q.v. He sustained the assertion of F. E. Robinson Co. of North Carolina, the labor subcontractor of Ling Electric, Inc., that Ling had breached the labor subcontract. We affirmed in No. 12,177 on the findings and for the reasons stated in that opinion.

Ling's principal claim in the present appeal, as it was in the trial court, is against the appellee, Federal Insurance Company, principally on the alleged default of Robinson in execution of the labor subcontract. Ling sues Federal as surety on the performance bond given to Ling by Robinson. In the findings and conclusions contained in its opinion holding that Ling had breached the subcontract, the District Court, of course, at the same time rejected Ling's claim against Federal alleging Robinson's default. Also in these findings and conclusions, the Court ruled against Ling on its claim for alleged defective work and additional "punch list" work of Robinson. It did, however, allow Ling $3926.54 as moneys charged back to Ling by its prime contractor on work done by Robinson. Here again we affirm on the opinion of the District Court.

In the present appeal there is also a claim by Ling, not appearing in No. 12,277, against Federal for malicious injury to credit, property, business and reputation. The tortious conduct alleged was the notice by Federal's principal, the labor subcontractor, to other parties in interest that Ling had breached its contract with the labor subcontractor; Federal's refusal to accept responsibility for completion of the contract; and the subcontractor's institution of litiga-

tion against Ling, all of which was charged as injuring Ling and done with the approval of Federal. The claim was dismissed in the District Court's order granting Ling judgment upon the back charges. As the District Court found Ling had broken the contract, and we have affirmed this decision, the tort claim is defeated too.

Affirmed.

UNITED STATES of America for the Use of F. E. ROBINSON CO. OF N. C., INC., and F. E. Robinson Co. of N. C., Inc.,

Plaintiffs,

v.

ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Manufacturing Company, and Alpha of Texas, Inc. and Continental Electronics Manufacturing Company, and Alpha-Continental, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Systems, Inc., and Continental Electronics Systems, Inc., and Ling Electric, Inc., and St. Paul Fire and Marine Insurance Company,

Defendants,

LING ELECTRIC, INC.,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

Nos. 518-Civ., 523-Civ.

United States District Court
E. D. North Carolina,
Washington Division.
Sept. 8, 1967.

OPINION AND ORDER

LARKINS, District Judge:

SUMMARY

This Miller Act case, Civil No. 518, comes before the Court without a jury for recovery of the reasonable value of labor and materials furnished to defendants in Pitt and Beaufort Counties, North Carolina by use plaintiff F. E. Robinson Co. of N.C., Inc. (hereinafter referred to as Robinson). Defendant Ling filed a counterclaim and a cross-action

against Robinson and Robinson's surety, Federal Insurance Company, for damages for malicious injury to Ling's credit, property, business, and reputation.

Use plaintiff Robinson, the Labor Sub Contractor, sued Ling Electric (hereinafter referred to as Ling), the electrical subcontractor, Alpha-Continental, the prime contractor, and St. Paul Fire and Marine Insurance Company, the surety of the prime contractor. Defendant Ling moved that Federal Insurance Company be made a party since they were surety for use plaintiff Robinson. Upon the allowance of this motion, defendant Ling crossclaimed against Federal Insurance Company and counterclaimed against Robinson. Federal Insurance denied all liability claiming that the defendant had breached the contract and, therefore, Robinson had the right to cease performance.

Defendant Ling previously filed an independent action December 18, 1962 against the Federal Insurance Company in Dallas, Texas on grounds of diversity of citizenship which was subsequently transferred to the Eastern District of North Carolina and assigned Civil No. 523 for the convenience of witnesses, and it was consolidated with the action Robinson had filed in Civil No. 518 against Ling, Alpha-Continental, and Alpha's surety. Defendant Ling later elected to pursue its action against Federal Insurance instead of the counterclaim and cross-action against Robinson and Federal Insurance filed in Civil No. 518.

Use plaintiff was later permitted to amend the complaint after notice and hearing.

FINDINGS OF FACT

This controversy arises out of the construction of the Voice of America project in Pitt and Beaufort Counties, North Carolina. These facilities consisted of three different sites referred to as Site A, Site B and Site C. The sites were about thirty miles from each other.

The United States Information Agency of the United States Government entered into a written construction contract dated November 10, 1960 with Alpha-Continental, a joint venture consisting of Alpha of Texas, Inc. and Continental Electronics Manufacturing Company in the amount of $12,173,000.00 for the construction and installation of radio transmitting and receiving facilities near Greenville, North Carolina.

Defendants other than Ling asserted in their answers that between November 10, 1960 and March 30, 1961 Continental Electronics Systems, Inc. was substituted by a novation agreement for Continental Electronics Manufacturing Company as a member of said joint venture, and the joint venture between Alpha of Texas, Inc. and Continental Electronics Systems, Inc. will hereinafter be called Alpha-Continental. The original contract required that Alpha-Continental pay the government liquidated damages if the contract was not completed by December 20, 1962. (Tr. 435).

St. Paul Fire and Marine Insurance Company executed a bond payable in the sum of $2,500,000.00 as required by the Miller Act, Title 40 U.S.C. Section 270a, guaranteeing payment to all persons supplying labor and materials in the

prosecution of the work provided for in contract No. 1A-7454 and modifications thereto. The bond bore date of November 9, 1960.

On March 30, 1961, Alpha-Continental and Ling entered into a written construction subcontract in the amount of $1,289,500.00 wherein Ling undertook to perform a certain portion of the work for the government project specified in contract No. 1A-7454.

On March 30, 1961, Ling entered into a written labor subcontract with Robinson in the amount of $325,000.00 which required Robinson to furnish a certain portion of the labor, related payroll expenses, tools, and equipment for the government project, which Ling was obligated to furnish under its subcontract with Alpha-Continental.

On April 7, 1961, Federal Insurance executed a performance bond in favor of Ling, guaranteeing Robinson's performance of the labor subcontract in the amount of $325,000.00.

Because of the nature of the disputes involved in this case it becomes necessary to examine certain portions of the contract between Alpha-Continental and Ling, and the contract between Ling and Robinson. Robinson's contract with Ling, paragraph one of the Continuation Sheet, related to payment for work done under the original contract and reads as follows:

> "1. A sum of money monthly on the tenth (10th) of the month following the completion of the work equal to the total gross payroll for the previous month plus an additional ten per cent (10%) without any

retainage. This manner of payment shall continue until payments totaling fifty per cent (50%) of the contract amount are advanced against the contract. Upon payment of fifty per cent (50%) of the total contract amount the two parties to this agreement shall review the actual completion of the contract with regard to releasing a percentage over and above the amounts paid as of that date. Total payments against this contract shall not exceed ninety-five per cent (95%) of the total adjusted amount until final acceptance of all work by the owner."

Paragraph 7 of the "Additional Provisions of Labor Sub Contract" between Robinson and Ling related to changes under the contract, and reads as follows:

"7. The Labor Sub Contractor shall accept no orders for extra work or changes under this contract unless same are presented in writing by the Sub Contractor, and shall make no quotations, suggestions or promises regarding any such work to any person other than the Sub Contractor. All extra work or changes hereunder shall be submitted to the General Contractor by the Sub Contractor only after receiving from the Labor Sub Contractor the labor requirements necessary to perform such changes or extras including overhead and profit. Payment to Labor Sub Contractor by Sub Contractor for any and all such extra work and changes shall be governed by separate agreement in writing and signed by both Labor Sub Contractor and Sub Contractor, and as the same may be affected by the general provisions of the general conditions."

The contract between Robinson and Ling also provided in pertinent part that the Labor Sub Contractor was

"* * * to furnish labor and related expenses as described in Section 3 hereof, for the Consolidated East Coast Facilities, Project 1A-5744, Sites A, B & C, for the United States Information Agency hereinafter called

> the owner at Greenville, North Carolina in accordance with all terms, covenants and condition of the contract between the General Contractor and the Sub Contractor."

The Labor Sub Contractor further agreed to keep informed as to the progress of the job, to begin work seven days after notification by the Sub Contractor, to prosecute the work continuously with all possible speed, and to complete the entire work within the time prescribed by the contract. The contract between Ling and Robinson further provided that the Labor Sub Contractor was not responsible for delays caused by the neglect, delay, or default of the Sub Contractor. It also provided that Robinson was to be paid $325,000.00, subject to additions and reductions for changes as may be agreed upon in writing by both parties provided that no payments were to be made unless the Labor Sub Contractor's rate of progress and work done was satisfactory to the Sub Contractor and the Contractor. The contract between Ling and Robinson did not provide for approval by the government or Alpha-Continental or payment by them before Ling was obligated to pay Robinson.

The additional provisions of the Labor Sub Contract provided that the Labor Sub Contractor acknowledge that it had read the plans, specifications, addenda, and covenants; that it had read the contract between the general contractor and the Sub Contractors; and that it would abide by all the conditions and terms of such documents, particularly the general and special conditions as the same applied to the Sub Contractor. The witness Bryant admitted that Robinson

regarded the general and special conditions of the Alpha-Continental-Ling contract as a part of his contract with Ling (Tr. 234, 235), but that he rejected the general and special conditions when they were in conflict with the provisions of the Long-Robinson contract (Tr. 175). Paragraph 4 of the Continuation Sheet provided that all overtime requirements by the general contractor to maintain the progress of the job were to be considered in the contract amount. Section 01 of the Alpha-Continental-Ling contract provided that "(A)ll bonding and grounding as set forth in the applicable specifications with the following exclusions: 1. Steel to steel." Section 01 was included in the labor breakdown in the contract between Robinson and Ling.

Article IV of the Alpha-Continental-Ling contract provided that Alpha-Continental would pay the contractor an amount equal to 90% of the percentage of completion, as so estimated, times the subcontract price, less any sums theretofore paid on account of the work performed and/or materials furnished, provided such amounts were reimbursed to Alpha-Continental under its contract with the government. This article does not mention the Labor Sub Contractor and the Court finds as a fact that it is not applicable to Robinson.

Article VI provided that changes must be in writing by an authorized representative of Alpha-Continental and no claim for additional compensation should accrue to the contractor (Ling) on account of any extra work unless the contractor should, prior to the commencement of the work, submit to Alpha-Continental a statement showing the

amount of extra compensation claimed by the contractor for such work.

Article VIII provided that nothing should excuse the Subcontractor from proceeding with the work in accordance with the determination of Alpha-Continental's authorized representative as to the interpretation of drawings and specifications.

The contract between Alpha-Continental and Ling further provided that Ling would insert Clauses XXX through XXXVI in all subcontracts and that a breach of any of the requirements of these clauses would be grounds for termination of the contract. These clauses had to do with the payment of wages under the Davis-Bacon Act 40 U.S.C. Section 276a-7 and overtime compensation. Article XXXIX provides for the coverage of disputes between Alpha-Continental and the electric subcontractor Ling Electric.

A. J. Bryant, president of Robinson, was familiar with the terms and conditions of the contract between Alpha-Continental and Ling in that his company had previously submitted a bid for the position of electrical subcontractor. (Tr. 172).

Within a month or two after Robinson commenced work on the project (Tr. 69), it also commenced performing a substantial amount of extra work and changes referred to in paragraph 7 of the Additional Provisions of the labor subcontract between Robinson and Ling and Article VI of the Alpha-Continental-Ling contract. Prior to the termination of the contract there were more than one hundred changes in the contract with the value of $76,798.51 per-

formed by Robinson (Tr. 67-89), and more than three hundred and forty seven items of extra work having a value of $68,962.51 (Tr. 68) performed by Robinson. The Court notes, however, with reference to the number of changes and extra work, that some of the work performed was invoiced separately for each site although the work was identical and therefore the number of change orders and extra work orders is somewhat deceiving.

As previously mentioned, Article 7 provided that orders for extra work or changes were to be in writing by Ling and that Ling and Robinson were to agree in writing for the payment provision for the work performed under these headings. About one-half of the time Ling issued written orders for extra work and changes and in very few, if any instances, were there signed agreements relating to the cost or payment for these changes or extra work. (Tr. 69-72). At first Robinson objected to performing this work without receiving written orders and written cost approval from Ling (Tr. 70-71), but Ling insisted that Robinson either perform these changes and extra work without a written agreement or leave the job. (Tr. 71-72). Mr. McAfee, Ling's representative, stated that he expected his oral orders to be followed in every instance. (Tr. 644). Mr. Bryant stated that if Robinson had insisted upon written orders before the work was done it would have caused the work on the project to be stopped. (Tr. 170). As a result, Robinson performed the work without the required written orders that the contract provided. Clearly, the performance in this manner

did not comply with the written or intended meaning of paragraph 7 of the contract, but as it became the common practice of the parties (Tr. 642), the Court finds as a fact that the parties waived this portion of the contract requiring written orders from Ling for changes and extra work. This provision was waived by the request of Ling to perform the work without written orders and by the payments of the amounts claimed during the early period of the contract without any objection by Ling as to the procedure involved.

In the beginning, Ling paid monthly Robinson's direct labor payroll for the project plus 10% thereof, said payroll covering work performed under the contract, change orders, and orders to speed-up (accelerate), but these payments did not cover extra work orders. In April or May of 1962 these payments were changed to bi-weeking and were so continued into June 1962. Ling paid for the extra work as invoiced, sometimes by separate check and sometimes by adding the invoiced amount for extra work to the monthly and bi-weekly payments, although no payment at all was made for many invoiced extra work items.

The testimony as to the reasonable value of the work performed pursuant to the directions of Ling, and for the use and benefit of Alpha-Continental, is in sharp conflict. Mr. McAfee, Ling's superintendent on the project, testified that the value of completing Robinson's uncompleted work

was approximately $70,000 (Tr. 623 erroneously shows $7,000.00), and that Robinson's work was about 20% uncompleted. (Tr. 725). He also testified that from twenty-five to thirty percent of the three-job sites remained uncompleted under the base contract without specifying whether he was referring to the Government-Alpha-Continental contract, the Alpha-Continental-Ling contract or the Robinson-Ling contract. (Tr. 603-605). Mr. Bryant, Robinson's president, testified that Robinson could have completed the uncompleted portion of its base contract for $25,475.42, and Mr. Armstrong, Robinson's project engineer, testified that he and Mr. Bryant arrived at this figure after computing the different categories of work and the man-hours necessary to complete that work (Tr. 351). Bryant testified that the reasonable value of the work performed by Robinson on this project was $558,305.24.

As previously mentioned as of September 24, 1962, Robinson had performed work designated as change order work in the amount of $76,798.51 (Tr. 67). The total amount of change order work requested by Robinson for payment was $81,323.09. As of September 24, 1962 Robinson had performed all of this work except for $4,524.58. Robinson accordingly allowed a credit to Ling in the amount of $4,524.58. As of that same date Ling had paid Robinson $25,948.61—this amount being reflected in the figure $382,471.52 which was the total amount paid Robinson by Ling. With respect

to this category of work there was no dispute between Ling and Robinson as to the classification of the work except with respect to the following seven items (Tr. 77-85, 690):

Description of Work	*Amount requested by Robinson*	*Amount by Ling credited*	*Differences in Dispute*
1. Backcredit by Robinson switchboard change	—(84.00)	—(3,622.75)	3,538.75
2. Corona Shield	5,355.95	0	5,355.95
3. Stress Cones	2,767.40	0	2,767.40
4. Stress Cones	2,652.40	0	2,652.40
5. Stress Cones	13,657.73	7,593.06	6,064.67
6. Stress Cones	12,586.53	6,560.00	6,026.53
7. Fireproofing substituted cable	1,426.46	0	1,426.46
Total	38,362.47	10,530.31	27,832.16

Ling contended that the deductive change order concerning item number one was not issued until after Robinson left the job. Assuming this to be true it would not make any difference as to the outcome of this lawsuit and would only reduce the amount owned Robinson on September 24, 1962 by Ling, an insubstantial amount compared with the total due.

Disputed item one above involved the question of how much credit Robinson should give Ling on account of the Government changing from the installation of an old to a new switchboard. The dispute arose because Ling felt the change in switchboards made the job easier for Robinson and for that reason Ling was entitled to a much larger credit than the credit submitted by Robinson. Before the change was ordered Robinson had spent a considerable amount of

time planning the installation of the old switchboard, partially installing the old switchboard, and removing the old switchboard to make way for the new one, and then installing the new switchboard. The Court finds as a fact that the Robinson credit to Ling in the amount of $84.00 for the change was reasonable. (Tr. 84, 339-341). Ling did not attack the reasonableness of this credit until after this action had been filed.

Disputed items 2-6 involved the question of how much credit Robinson should receive from Ling by reason of Robinson installing corona shields and stress cones on certain cable which was required by the government's changing the specifications from the use of three conductor unshielded cable to single conductor shielded cable on August 1, 1961. (Tr. 90, 841-843). Robinson did not receive notice of this change until the substituted cable arrived at the job site (tr. 90). Robinson's prices for this change were based upon its actual experience in completing the work and were reasonable, and practically all of this work had been completed by August 1962. All of this work constituted changes from the Ling-Robinson contract specifications and for which Robinson was entitled to extra compensation. Mr. McAfee testified that there was nothing on the prints or in the specifications as to how the cables were to be terminated. He stated that good practice indicated the installation of these stress cone type termination.

Disputed item 7 involved the question of whether Robinson should be paid additional compensation for additional

labor required in fireproofing single conductor cables, which had been substituted for the three conductor cable required by the original specifications. (Tr. 85). This change was brought about by the changes in specifications from the three conductor cable to single conductor cable. The change required Robinson to wrap, varnish, and fireproof three cables instead of one cable as originally specified. Robinson performed this work prior to August 1, 1962 and submitted its statement to Ling. The amount of $1,426.86 is a reasonable charge for this work and Ling had made no payment for this work nor given any credit to Robinson for this work.

All of these seven items were included in the work for which Ling informed Robinson on September 18, 1962 that no payment would be made until after the government had approved it.

Sometimes after its final settlement with Alpha-Continental in July 1963, concerning which settlement Robinson did not receive notice and was not a party, Ling gave Robinson a credit on its books as shown in items five and six of the above table. As the credit was not given until after Robinson left the job, Robinson was correct in using these figures in ascertaining the amount due as of September 24, 1962 although the credit was contained in the figure as a credit to the amount which Ling seeks to recover in its cross-action against Federal Insurance Company.

All of the foregoing seven items of change order work were performed on the project by Robinson upon Ling's orders and for the use and benefit of Alpha-Continental.

During the course of the work Robinson also submitted invoices to Ling for extra work, that, is, work not contained in the contract specifications in the amount of $68,962.51. (The use plaintiff's exhibits H, I, J introduced in this case concerning the extra work do not reflect the correct totals for each exhibit. The Court also notices that the total obtained by adding the sums reflected in Plaintiff's Exhibits H, I, J does not coincide with the total testified to by the witnesses. However, as the figure testified to is lower than the true figure reflected by adding the figures, the Court uses the lower set of figures which is the $68,962.51 for the total of extra work. These invoices did not include invoices for change order or speed up work except as otherwise noted. Ling paid Robinson $35,136.78 (Tr. 94) on these invoices before Robinson left the job on September 24, 1962. On September 18, 1962, Ling informed Robinson that Robinson would not be paid any more for its welding and brazing, extra work which had previously been performed. (Tr. 145-146). Subsequently, Ling, after its final settlement with Alpha-Continental in July 1963, gave credit on its books for $12,611.09 (Tr. 95-96) for extra work performed by Robinson which had not been paid at the time Robinson left the job. This credit was also given against the amount which Ling prayed for in their cross-action against Federal Insurance Company. The invoices for extra work thus remaining in dispute between Ling and Robinson are listed in plaintiff's exhibit J and total $21,851.06 and bear dates from

October 10, 1961 — August 13, 1962. Ling did not give any credit or make any payment for these disputed extra work orders in the amount of $21,851.06.

Of these disputed invoices for extra work $19,007.67 were Robinson's invoices for brazing (steel to steel bonding) which includes cover brazing, corner head for lathes, brazing metal lathe, brazing vertical reinforcing for masons, and brazing vertical and horizontal reinforcing for mason. This work consisted of bonding or joining together pieces of steel. Mr. Bryant testified that when Robinson first went on the job the welding of structural reinforcing was being done by steel erection contractors, and when they finished erecting the steel, the masonry work was begun. As the steel erection contractor had already left the job, Robinson was requested to do this work. (Tr. 100-101). In other words this work was "steel to steel" which was excluded from the Alpha-Continental-Ling contract by Section 01. (Tr. 97-101, 371). This brazing work was undertaken by Robinson at the request of Ling (Tr. 101, 333) and, pursuant to Ling's agreement to pay Robinson additional compensation. Mr. Bryant testified that he attempted to get a written contract for his work but that Ling refused to enter into a contract in writing. He further stated that he was not worried because during this period of time Robinson was being paid the invoices so therefore he did not see any need for a written contract. Robinson rendered invoices to Ling weekly for the brazing work and these invoices were paid regularly by Ling until the latter part of October 1961 (Tr. 103, 112-117, 488) at which time Ling

had paid about $6,000.00 to Robinson for brazing work as extra work (Tr. 369). Following this, Ling continued to direct Robinson, orally and in writing, to continue performing the brazing work, and Robinson continued to perform said brazing work (Tr. 117, 337) to the extent of $19,007.67. Ling did not at any time communicate to Robinson any objection as to the amounts of these invoices (Tr. 119, 337).

Bryant testified that Robinson performed bonding and grounding of copper, copper mesh, bronze, steel and copper brazing, and all work under Section 01 except steel to steel which was excluded. (Tr. 103). Bryant further stated that Robinson did perform some steel to steel brazing and bonding but this work was not required under Section 01 of the Alpha-Continental-Ling contract but under Section 301 of that contract which further defined the work Robinson was to perform. (Tr. 224-226).

Ling subsequently refused to pay Robinson and notified Robinson that Ling and Alpha-Continental were of the opinion that a portion of this invoiced work was part of Robinson's base contract and that Ling was going to withhold payment until they discussed the matter with Robinson (Tr. 118). Robinson continued its efforts to collect the invoices for this work and contiued to do the work at Ling's instructions.

The remainder of these disputed invoices listed as the last sixteen items on plaintiff's Exhibit J cover miscellaneous items of extra work performed by Robinson at Ling's request, and for which completed work Robinson submitted

invoices to Ling at various dates from October 24, 1961 to August 13, 1962. These sixteen items total $2,843.39.

The Court finds that the extra work for brazing set forth on Plaintiff's Exhibit J was not required by Robinson's base contract with Ling as this work was steel to steel bonding (Tr. 110). Since Article 01 of the Alpha-Continental-Ling agreement specifically excluded steel to steel bonding and grounding from the work required of Ling, it follows as a matter of course that the Ling-Robinson subcontract did not bind Robinson to perform any more work than was required of Ling. (Tr. 527, 746-748). Mr. McAfee stated that the contract between Alpha-Continental and Ling and the contract between Ling and Robinson were the same as to the scope of the work (Tr. 527). It is also significant to note that various Ling and Alpha-Continental representatives signed orders approving this brazing work performed by Robinson as extra work, and that these orders bore notations by the representatives such as "(B) razing for brick masons" (Tr. 113) and "this work should have been done by lathers." (Tr. 114).

The Court finds that this work was not required by Robinson in its basic contract with Ling, and that Robinson is entitled to this additional compensation of the reasonable value of the work performed.

As there was not an express provision covering the payment for this extra work, it would appear that Robinson should have been paid for this work within a reasonable time after the invoices had been delivered to Ling. There-

fore, Ling should have paid Robinson before September 24, 1962 for all of the items of extra work listed in plaintiff's exhibit J as all of this work had been performed and invoices submitted therefor between October 20, 1961 and August 13, 1962. Ling should have also paid Robinson for the items of extra work listed on plaintiff's Exhibit I, with the exception of the last three items thereon, and the amount Ling should have paid Robinson for these items is $11,995.91. This extra work was completed by Robinson and invoices submitted to Ling at various dates between March 1962 and September 7, 1962. The last three items listed on plaintiff's exhibit I were not in dispute as to whether they were for extra work or for the amount due thereon, as Ling gave credit for these invoices on its books, but it is possible that Ling may not have been able to pay these invoices by September 24, 1962. The Court finds that before September 24, 1962 Ling should have paid to Robinson an additional $33,846.97 ($21,851.06 plus $11,995.91) for extra work performed and billed by Robinson and not required by the original contract.

By the end of 1961 and beginning in 1962, the progress of the government project was three to four months behind schedule (Tr. 332). This was not due to any fault of Robinson although defendants did contend that the status of the work was due partly to a failure of Robinson and other subcontractors to properly staff the project. Alpha-Continental complained to the government that the job was delayed because of conditions beyond the control of Alpha-

Continental or any one that they were responsible for. (Tr. 473, 798).

In March 1962 the Government asked Alpha-Continental for cost estimates to speed up the work on the project. (Tr. 474-475). Alpha-Continental in turn requested Ling Electric to submit an estimate of how much it would cost to speed-up the progress of its work on the project. At Ling's request Robinson submitted an estimate of $69,797.98 as the additional cost to put the speed-up into effect. Ling instructed Robinson to put the speed-up program into effect immediately, stating that Alpha-Continental had said that it should be put into effect. (Tr. 122-123). Ling Electric submitted the speed-up estimate to Alpha-Continental, who in turn submitted it to the United States Information Agency. The proposed speed-up program was rejected by the United States Information Agency in late March or early April of 1962. (Tr. 758-759).

Although Ling ordered the speed-up into effect after receiving Robinson's estimate, the evidence does not show that Ling and Robinson specifically agreed upon the price that would be paid to Robinson for this work. Ling and Alpha-Continental knew that Robinson was performing a vast amount of speed-up work and that Robinson expected to be paid. As a result of the speed-up Robinson added additional men (including foreman, general foreman, and material expeditors), changed the field engineer from part time to full time, raised wages to attract more electricians and worked six full days a week instead of five. Robinson almost doubled its labor force as a result of the speed-up

program. Bryant made numerous requests to ascertain the status of the speed-up work, said requests extending into September 1962. On September 18, 1962 Robinson was informed that the speed-up work would not be paid for.

On April 26, 1962 the Government and Alpha-Continental amended the original contract to provide Alpha-Continental with the opportunity to earn an incentive bonus of $2,500.00 per day for each day the project was finished before February 8, 1963. The maximum incentive bonus that Alpha-Continental could earn on its project was $150,000.00. The incentive bonus also provided for liquidated damages if the contract was not finished by the 8th of February, 1963. (Tr. 435,486). The original completion date was extended from December 20, 1962 until February 8, 1963. Robinson's first knowledge of the incentive bonus came in reply to a letter which Bryant had written to his Congressman.

Robinson continued to perform the speed-up work at the insistence of Ling and Alpha-Continental. Ling had knowledge in late March or early April that the speed-up work had not been approved by the United States Information Agency but did not inform Robinson of its knowledge. Robinson realized that the work had not been finally approved, but continued to do the work as it was being paid its additional costs of the speed-up and accordingly was not worried for that reason. At the insistence of Ling, Robinson continued to perform the speed-up under the impression that the estimate was still being processed and that payment would be equitably adjusted when Alpha-

Continental or the United States Information Agency approved although, in fact, the estimate had already been rejected. (Tr. 313-314, 758-759).

During this time Alpha-Continental, through Ling Electric, informed Robinson that it would pay the one-half time of the time and one-half overtime. Alpha-Continental by the terms of its contract was not bound to pay this amount to Ling who was not required to pay the amount to Robinson as the contracts provided that all overtime costs to keep up with the progress of the project were to be carried by Robinson. Ling, in fact, informed Robinson that it was not going to reimburse Robinson for this overtime as it was a part of Robinson's contract. (Defendant's Exhibit 3-E). It would seem that Alpha-Continental realized that it was requiring work that was not within the Alpha-Continental-Ling contract or the Ling-Robinson contract. Ling did, however, pay the overtime. Robinson was also paid ten cents per hour by Alpha-Continental and Ling, who were not bound to make this payment under the contracts. The payment became necessary because of a shortage of capable electricians caused by the increased demand as a result of the speed-up work. The wage scale was increased from $2.85 per hour to $3.10 per hour.

The reasonable value of the speed-up work performed by Robinson on the project at the direction of Ling and for the use and benefit of Ling and Alpha-Continental between March and the time Robinson left the job was $69,797.98, the amount of the original estimate.

The status of the account between Ling and Robinson as of the time Robinson left the job on September 24, 1962 was as follows:

Amount of work described in original contract which had been completed:		
$325,000.00		
25,475.42		
299,524.58		
Reasonable value of basic contract work performed by Robinson:		299,524.58
Amount of work ordered and directed by Ling as changes, change orders:		
81,323.09		
—4,524.58		
76,798.51		
Reasonable value of change order work performed by Robinson:	76,798.51	
Less Retainage of 5% by Ling	—18,816.15	
		357,506.94
Invoiced amount of specific work in addition to basic contract work and changes performed pursuant to orders of Ling referred to as "Extra Work" orders (excluding speed-up)		68,962.51
Reasonable value of speed-up work performed at the order and direction of Ling		69,927.98
Deduction to eliminate duplicate inclusions for premium time (10¢ per hour of wage increase plus portion of overtime) which were included in above extra work invoices and in valuation of speed-up work		—15,572.53
Total amount of work performed by Robinson through September 24, 1962 (excluding 5% retainage)		480,824.90

Total amount paid to Robinson by Ling as of September 24, 1962	382,471.52
Amount owed Robinson by Ling as of September 24, 1962 not including retainage of $18,816.15	98,353.38
Less Deductions	—2,089.75
	96,263.63

The amount of $98,353.38 should be reduced further in the following amounts: 1. Payroll 77 was for the week of September 24-30, 1962 and Ling would have been unable to process these amounts by the time Robinson left the job. The amount of the payroll is $1,473.60; 2. The last three items on Plaintiff's Exhibit I in the amount of $616.15 were invoiced in September and it is possible that Ling was unable to process these items before Robinson left the job. The total amount of the deduction is $2,089.75.

The reasonable value of the services performed by Robinson at the request of Ling Electric and Alpha-Continental and for their use and benefit is $117,169.53. This amount is figured as follows:

Reasonable value of work performed pursuant to base contract	299,524.58
Change Order Work	76,798.51
Extra Work	68,962.51
Speed-up Work	69,927.98
	515,213.58
Amount paid to Robinson	382,471.52
	132,742.06
Less Duplication of Amounts	—15,572.53
Amount due Robinson by Ling	117,169.53

The difference in the two figures is due to the fact that as of September 24, 1962 Ling was entitled under the terms of the contract to retain 5% which amounted to $18,816.15.

In June 1962, Ling notified Robinson that Ling would not pay Robinson's regular payroll billings at the end of June 1962 for the reason that Ling had already paid Robinson 95% of the original base contract amount of $325,000.00 plus approved change orders. The parties stipulated as of the end of June 1962, Robinson had been paid by Ling $329,928.80. From the end of June 1962, until the time Robinson left the project Robinson apparently had been paid $52,542.72 by Ling.

On July 11, 1962 as a result of Robinson's objection to Ling discontinuing making the payroll payments, a meeting was held between Ling and Robinson. At this meeting the parties discussed payment for work performed by Robinson on the project. The work was divided into three basic categories: 1. invoices questioned but paid; 2. invoices questioned and unpaid; 3. invoices unquestioned and unpaid. (Tr. 209). The parties as a result of the meeting agreed that Ling was to pay Robinson the sum of $20,000.00 with a deduction of $3,000.00 credit given Ling by Robinson. Ling contends that at this meeting Robinson's representatives agreed that no further payments would be made by Ling to Robinson for these outstanding disputed extra work invoices unless and until Ling succeeded in receiving some of the cost from Alpha-Continental or the Government. Robinson denied making any such agreement. In support of its contentions, Ling introduced its letter to Robinson

dated July 15, 1962 purporting to confirm the agreement (defendant's exhibit 3-a-1). This letter stated the alleged agreement between the parties. On July 19, 1962 Robinson answered Ling's letter of July 15, 1962 in which it denied making the alleged agreement recited in the Ling letter. Thereafter, Robinson received Ling's check dated July 30, 1967 for $17,000.00 bearing no notation as to what it covered and without any letter of transmittal. (Tr. 321). The Court finds as a fact that there was not an agreement between Robinson and Ling that Robinson would be paid for disputed extra work invoices only if and until Ling received payment from the Government or Alpha-Continental. The only agreement was that certain items would not be submitted until later in the job. This agreement was made during the early stages of the project. This agreement was breached by Ling when it informed Robinson that it would not be paid until the Government and/or Alpha-Continental had authorized payment or the changes. The Court further finds as a fact that there was never any agreement between Alpha-Continental, Ling and Robinson that Robinson should await approval of the Government and/or Alpha-Continental before performing or being paid for performing change order work, extra work, or speed-up work.

During the period from the end of June 1962 until September 24, 1962 Robinson received checks from Ling. The amounts of these checks were credited to the base contract, speed-up, extra work and change orders. Some of these checks did not carry any notation as to which account the proceeds were to be credited.

During the summer of 1962, after Ling had ceased making to Robinson payments based on payroll, Robinson borrowed funds to the extent of its credit and Jack Bryant, Robinson's president, borrowed $50,000.00 personally for the benefit of F. E. Robinson, Inc. It was necessary that Robinson borrow money in order to meet its payroll obligations.

On August 17, 1962 Robinson was short of funds and informed Ling that it might be compelled to leave the job because it was running out of money. (Tr. 199-200). During this time Robinson requested additional payments from Ling and offered to complete the balance of the contract on a cost-plus basis.

In September 1962 Ling informed Robinson that a meeting would be held in Dallas between Ling and Alpha-Continental. At this meeting Robinson's claims for payment were discussed. Jack Bryant requested that he be allowed to attend the meeting in behalf of Robinson, but this request was denied.

On September 18, 1962, Ling notified Robinson that at the Dallas meeting between Ling and Alpha-Continental, at which meeting Robinson was not represented, a decision had been reached not to pay Robinson any more money for speed-up, for steel to steel bonding, or for the other extra work that was still in dispute, and not to pay Robinson the balance for the change order work, and that the change order work would not be added to the contract until such time that the Government or Alpha-Continental ap-

proved. (Tr. 145-146, 314). There is not any evidence before this Court that Robinson ever consented to these new terms being imposed.

On Saturday morning, September 22, 1962, Robinson, through its directors and president decided to withdraw its forces from the job. (Tr. 146-147, 96-98) and on September 22, 1962 Robinson mailed a notice (Plaintiff's Exhibit N) to Ling that it was withdrawing its forces from the job. (Tr. 146-147). On Monday morning September 24, 1962 Robinson paid off its workers on the job, discharged them, and notified Ling's representative on the job site of its withdrawal.

The decision and action by Robinson described above was made and taken by Robinson solely on its own initiative and solely for the reasons which it and its counsel believed necessary and justified for the protection of their interest in this matter.

CLAIM OF LING v. FEDERAL

Within a week after Robinson had left the job, Ling assumed performance and was working a full schedule. Ling notified the Federal Insurance Company, Robinson's surety, that Robinson had left the job. In the cross action against the Federal Insurance Company, Ling contended that it cost them $109,388.75 to complete the work and allowed Federal a credit in the amount of $49,007.85 for work approved after Robinson left the job. As previously mentioned it was Ling and Alpha-Continental who breached the con-

tract and not Robinson. Due to the breach by Ling and Alpha-Continental, Robinson was not required to perform further and was justified in ceasing to do the work and withdrawing its men. The only amount therefore that Ling is entitled to recover of Federal is the value of backcharges by Alpha-Continental against Ling in the amount of $3,926.54. The total amount of back charges by Alpha-Continental against Ling is $12,466.54 but some of these charges were dated after Robinson left the job. For this reason the Court has declined to allow Ling to recover as damages any amounts which resulted in the breach of contract by Ling. Ling is therefore only allowed recovery for the backcharges which occurred before Robinson left the job as Robinson was justified in so leaving.

Ling is also entitled to recover of Federal the amount expended for the corrections of defective work performed by Robinson before it left the job. From the record in this case it is difficult to ascertain the value of the defective work corrected by Ling after Robinson had left. Mr. Bryant testified that it was customary to have a certain amount of defective work. He stated that after his men had left the job they did not go back to correct any errors if, in fact, there were errors. Bryant further testified that Robinson never inquired of Ling or Alpha-Continental as to whether or not there was any defective work.

The difficulty arises due to the inability of the Court to distinguish which items on defendant's Exhibit L-2A result from defective work and which items were incurred as a

result of the breach of contract by Ling. Any amount which the Court would allow as a recovery would be arbitrary and for that reason the Court is unable to allow Ling to recover against Federal the damages resutling from defective working performed by Robinson before they left the job on September 24, 1962.

Looking at the case as a whole it appears that Ling ordered Robinson to perform work that was not covered by the Robinson-Ling contract, and then considered the amounts paid for this work as payments for the contract price. Of course, if the contract is carried on in this manner Robinson would reach 95% of the contract amount in a very short period of time when actually much of the work for which he had been paid is not base contract work.

CONCLUSIONS OF LAW

Jurisdiction in Civil No. 518 is based upon Title 40 U.S.C. Section 270b(b) and upon diversity of citizenship with the requisite amount in controversy. Use plaintiff Robinson is a North Carolina corporation and all defendants are out of state corporations or companies. Defendants made various motions attacking the jurisdiction of the Court as to the subject matter, and said motions were overruled by the Court. Defendants have admitted that the Court has jurisdiction of the parties.

Robinson's suit was filed May 7, 1963 within one year after the day on which Robinson furnished its last labor for the project. This fact has been admitted by defendants in their answers. Robinson gave notice as required by Title

40 U.S.C. Section 270b On October 29, 1962 by registered mail, informing defendants that they were making claim against them in the amount of $158,087.48 due for labor performed and related expenses. Defendants have admitted that they received this notice and that the notice was sent within ninety days after the work had been performed on the project.

The purpose of the Miller Act is to protect those who furnish labor and materials for public construction and to insured that they will be paid. The act was not, however, designed to protect the general contractor. In order that the purposes of the act may be effectuated the Courts have said that the Act should be liberally construed, but this does not mean that the Courts will draft a new contract for the parties or impair their expressed intention. *St. Paul-Mercury Indemnity Company v. United States*, 238 F. 2d 917 (10th Cir., 1956).

Robinson is a subcontractor within the meaning and intent of the Miller Act as it performed a specific part of the labor requirements of the prime contract, that is, the contract between the United States Information Agency and Alpha-Continental. Robinson, although not in privity with the prime contractor, did supply labor to the prime contractor's subcontractor.

The substantive law of North Carolina with respect to quantum meruit, the amount of the recovery and the allowance of interest controls the present case. *Central Steel Erection Co. v. Will*, 304 F. 2d 548 (9th Cir., 1962), *United States v. Continental Casualty Company*, 303 F. 2d 91 (4th Cir.,

1962), *Harris and Harris Const. Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). The Court stated in *United States v. Citizens & Southern Nat. Bank of Atlanta, Ga.* that the substantive law of North Carolina was to be applied in determining the respective rights of the parties through jurisdiction was conferred by the Miller Act. See also *Wells Benz v. United States*, 333 F. 2d 89 (9th Cir., 1964), *Continental Casualty Co. v. Schaefer*, 173 F. 2d 5 (9th Cir., 1949).

The defendant Ling committed a material and substantial breach of its agreement with Robinson in failing to pay Robinson substantial sums of money which were due and owing to Robinson as of September 24, 1962, the date Robinson left the job. This rule is especially applicable when the subcontractor is to furnish labor over a long period of time and the involvement of large sums of money. *United States v. Southern Construction Company*, 293 F. 2d 493 (6th Cir., 1961), *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 248 U.S. 334 (1918). The Court also takes note of the provisions of 40 U.S.C. Sec. 276(a) requiring that laborers be paid not less than once a week.

Robinson performed work consisting of changes to the original contract, extra work in addition to the base contract, a portion of the base contract itself, and speed-up work at Ling's direction and request, and for the use and benefit of Ling and Alpha-Continental. There was not an express agreement between Ling and Robinson as to the value of the change order work, the speed-up work and

the extra work or the time in which payment would become due. The only evidence of the reasonable value of the speed-up work is the estimate which Robinson prepared for Ling at Ling's request and the request of Alpha-Continental, and Robinson's final costs for doing the speed-up work. The only evidence as to the reasonable value of the change order work and the extra work are the invoices submitted to Ling for payment and the testimony by witnesses representing Robinson. Jack Bryant testified for the use plaintiff that the reasonable value of all the work performed on the project by Robinson was $558,305.24. The Court concludes that as the base contract was not fully performed, that certain work was performed by Robinson outside the scope of the original contract, and the use plaintiff is entitled to a recovery based on quantum meruit. The law implies a promise by Ling to pay Robinson for the work performed on the project a reasonable amount within a reasonable time. *Fanderlik-Locke Co. v. United States*, 285 F. 2d 939 (10th Cir., 1960), *Grady v. Faison*, 224 N.C. 567, 31 S.E. 2d 760 (1944), *Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E. 2d 472 (1952). The defendant is forced into the field of quasi or implied contract where irrespective of the intention of the parties to be charged, the rule is that liability arises when one is enriched and receives a benefit at anothers expense for which equitably he ought to pay. *Ross Engineering Co. v. Pace*, 153 F. 2d 35, 45 (4th Cir., 1946).

> "An offer need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested promise by the offeree

amounts to an offer. The common illustration of this principle is where performance of work or services is requested. If the request is for performance as a favor, no offer to contract is made, and performance of the work or services will not create a contract; but if the request is made under such circumstances that a reasonable person would infer an intent to pay for them (and this is always a question of fact under all the circumstances of the case) the request amounts to an offer, and a contract is created by the performance of the work. And even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited is liable." Williston On Contracts, Revised Edition, Vol. 1, Section 36 (1957).

The plaintiff contends that the evidence shows that there were three major and material breaches of the contract by the defendants. The first breach was that the defendant Ling failed and neglected to bring the periodic payments up to date. The second was the failure to pay for a substantial portion of the work performed as a result of change orders, extra work, and speed-up. The third breach was the communication to the plaintiff of defendant's decision not to pay plaintiff the large sum for orders to speed-up the progress of the project, extra work orders, and change orders, which refusal amounts to a repudiation of the contract by Ling. The Court has found that the defendants did fail to keep the periodic payments up to date as called for in the contract between Ling and Robinson and that it failed to make payment for a large portion of the extra work, change orders and speed-up, and finally that on September 18, 1962 it informed Robinson that it was not going to pay any more money for the change orders until they had been added

to the base contract, and that it was not going to pay any more for the extra work and speed-up and in the same breath ordered Robinson to speed-up the contract. The Court has therefore found that there was a substantial and material breach, said breach going to the very essence of the contract and justifying Robinson in refusing to continue work on the project. The subcontractor cannot and should not be expected to finance the project until such time that the prime contractor or the Government decides to pay the amount due. If the subcontractor is ordered to perform the work or even requested to do so, then the obligation in the absence of an express contract provision falls upon the party so ordering the work to be done to pay a reasonable amount for that work within a reasonable time. To hold otherwise would cast a burden upon the subcontractor which in many cases would be impossible to carry as the subcontractors are usually smaller in size than the prime contractors. If the work is found to be covered by the contract the performing party will be compensated by the terms of the contract. If there is not an express provision for payment then he is entitled to receive the reasonable value of his services. Of course, the prime contractor or in this case a contractor such as Ling Electric may order the labor subcontractor to perform work which is within the scope of the contract. In that case the labor subcontractors would be committing a breach of its contract if it refused to perform this work. The items that the subcontractor is ordered to do may be small in size judging by monetary standards, but these small items do add up as shown in this case. If he goes ahead and performs the work he does

not take the risk of breaching his contract and if the work is found to be outside the contract he will be compensated.

Pitfalls as to what is or is not within the scope of the original contract can be eliminated by careful scrutiny of the contract before it is signed and by adequate laison between the parties to the contract. In a project of this size it is mandatory that the parties have some liason between them. They must work together with a common goal, that the project be completed according to the terms of the contract. Of course, there will be certain changes made to the contract in projects of this size, but by working together, complying with all contract provisions such as the required writings for change orders and by prompt settlement of accounts, many of the difficulties witnessed in this case may be avoided. Proper accounting practices should also be employed so that it is possible to ascertain the status of an account without having to do lengthly research and tabulation. If all Government projects are carried on in the same manner as this project, it is a wonder we do not have even more litigation in this field. The way in which this contract was handled was a breeding ground for litigation from the very beginning.

Defendants have vigorously objected to any allowance of damages based upon quantum meruit. This Court, however, disagrees with this contention upon the facts herein presented. Professor Corbin states:

> "One who has rendered service or supplied work, labor, and materials under a contract with another, but who has been wrongfully discharged or otherwise pre-

> vented from so far fully performing as to earn the agreed compensation, may regard the contract as terminated and get judgment for the reasonable value of all that the defendant has received in performance of the contract. This rule is applicable to contracts of personal service and to all kinds of construction contracts. The defendant's breach may have been a repudiation, a discharge, a prevention of performance by the plaintiff, or a failure to perform the agreed exchange due from the defendant."

Corbin on Contracts, Vol. 5, Section 1109 (1964) In dealing with quantum meruit the Court of Claims had said,

> "These cases contain broad statements to the effect that 'quantum meruit cannot be allowed where there is a valid contract between the parties.' Frazier-Davis Constr. Co. v. United States, supra, 100 Ct. Cl. at 162. In each one, however, quantum meruit relief appears to have been considered, as an alternative, only after the Court found that the contract was not breached." *Acme Process Equipment Co. v. United States*, 347 F. 2d 509 (Ct. Cl., 1965) reversed on other grounds 285 U.S. 138 (1966). (Footnote 28).

The cases cited by the defendants state generally that the Miller Act does not substitute a claim or cause of action in quantum meruit in derogation of the express and effective contract. This proposition is a correct statement of the law, but it must be applied to the facts before the Court. Of course, a plaintiff may not cast aside an express and effective contract and seek recovery based on quantum meruit as a matter of right in every case. There must be some legally sufficient reason to justify the use of quantum meruit, or any contractor upon seeing that he had made a bad bargain would seek compensation for the reasonable value of its services, and not the amount as provided in the

contract. The plaintiff does not have the unrestricted right to seek quantum meruit relief at his option. The facts of the particular case must show that he is entitled to such relief. In *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362, 368 (1964) the Court said:

> "(1) When the offeree has performed a part of the service specified in the offer and is prevented by the offeror from completing the service, offeree is entitled at least to a compensation on a quantum meruit."

Defendant Ling further contends that Robinson is precluded from recovery on quantum meruit because its complaint does not unambiguously request that measure of relief. The Court, however, notes that Rule 54c of the Federal Rules of Civil Procedure as cited in *United States v. Zara Contracting Co.*, 146 F. 2d 606 at 609 (2nd Cir., 1944) provides that "* * * after trial the judgment must grant the relief to which plaintiff's case as presented entitled them." It is clear from the evidence that plaintiff is seeking and is entitled to a recovery for the reasonable value of the services performed or quantum meruit.

In computing the reasonable value in quantum meruit, it is proper to base calculations upon the cost basis that Ling and Robinson used in negotiating the original Ling-Robinson contract. *Acme Process Equipment Co. v. United States*, 47 F. 2d 509 (Ct. Cl., 1965) reversed on other grounds 385 U.S. 138 (1966). *St. Paul-Mercury Indemnity Company v. United States*, 238 F. 2d 917 (10th Cir., 1956). See also *United States v. Behan*, 110 U.S. 338 (1884). The services may be valued at the amount they could have been purchased from one in plaintiff's position at the time they

were rendered. *United States v. Zara Contracting Co.*, 146 F. 2d 606 (2nd Cir., 1944). The reasonable value of the services and materials is generally considered to be the amount for which they could be obtained under like circumstances. *Wunderlich Contracting Co. v. United States*, 240 F. 2d 201 (10th Cir., 1957). It follows that in the negotiations each side seeks to secure the best possible bargain. The contractor does not want to pay more than he has to and the subcontractor seeks the greatest amount of money he can secure for the work performed. In many cases, although not all, the amount agreed upon as the value of the services will be the same as the reasonable value of the services which a court will award, based upon quantum meruit, as this is the value which plaintiff could have received for his performance in the market as of the time of his performance. This, of course, will vary upon the facts in the particular case. In some cases due to unforeseen circumstances, the amount agreed upon by the parties may vary greatly from the reasonable value of the services. The value of the services are not necessarily the cost of the actual performance of the actual benefit to Ling. *Acme Process Equipment Co. v. United States*, 347 F. 2d 509 (Ct. Cl., 1965) reversed on other grounds 385 U.S. 138 (1966). In the case at hand, the Court has found that the reasonable value of the work is the amount or value of the work performed under the base contract and the speed-up estimate. These are the costs of what Ling could have secured this work at the time the work was performed. As to the change order work and the extra work the Court has used the invoiced amount submitted to Ling by Robinson as the reason-

able value of this work, as Mr. Bryant testified that these amounts were reasonable, and the Court also notes that Ling paid many of the invoices based upon the same computations used in these invoices. The main contention of Ling is that the invoices were covered by the contract between Ling and Robinson, but this Court has held otherwise and allowed recovery on quantum meruit.

As previously stated, the contract between Ling and Robinson provided that the labor subcontractor was not to accept orders for extra work or changes unless they were presented in writing by the subcontractor with a separate agreement regarding payment for work performed pursuant to these orders. This Court has found that the parties waived the provisions of paragraph 7 of the additional provisions, by Ling giving oral orders to Robinson to perform this work and by Robinson complying with those orders. A waiver takes place when a person dispenses with the performance of something which he had the right to exact. A party may excuse the performance of certain conditions either expressly or by his conduct which leads the other party to believe that performance is dispensed with. Waiver may be found where in the course of dealing, one party has dispensed with certain conditions in its favor and the other party has acted without meeting those conditions on the theory that their performance is not required. *Harris & Harris Const. Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). A person is not allowed under the standards of fairness to accept the benefits of work performed and then insist that he is not liable to pay for that work because the provisions

of the contract were not complied with. The dictates of fairness indicate that to allow this would permit one to benefit by his own wrongdoing to the detriment of the party whom he has misled. When a practice has become the established way of performing the contract one side may not later contend that they are not liable because the parties have not complied with the contract. The lack of written orders as required by the contract does not preclude the subcontractor from recovery where from the very beginning the parties ignored the contract provisions, and the testimony discloses that the items were treated as extras or additions to the contract, and were ordered and accepted by the contractor and used in the performance of the work. *Ross Engineering Co. v. Pace*, 153 F. 2d 35 (4th Cir., 1946).

Defendants also contend that the Court is without jurisdiction as the plaintiff did not pursue his administrative remedies open to them in Article XXXIX of the Alpha-Continental-Ling contract. The basis for this contention rests upon a provision in the Robinson-Ling contract which stated that the labor subcontractor (Robinson) agreed to furnish labor and related expenses in accordance with all terms, covenants, and conditions of the contract between the general contractor (Alpha-Continental) and the subcontratcor (Ling). The question therefore is whether or not Article XXXIX is to be applied to Robinson. In *Fanderlik-Locke Co. v. United States*, 285 F. 2d 939 (10th Cir., 1960), the Court was faced with the same issue now before this Court. The Court said that there was not any procedure by

which the claim of the subcontractor could be presented against the United States except as it became the claim of the prime contractor. The contract was between the United States Government and the prime contractor and the subcontractor was not a party to that contract. The finding in the administrative hearing or review would be binding upon the parties in the absence of fraud, capriciousness, or gross error. The Court held that to reach such a result it would have to be manifest by the plain language of the contract. See also *Central Steel Erection Co. v. Will*, 304 F. 2d 548 (9th Cir., 1962). In *United States v. Cleveland Electric Co. of South Carolina*, 373 F. 2d 585 (4th Cir., 1967) the Court reached the same result reached in Fanderlik, Supra. The Court stated that the Government does not recognize or deal with the subcontractor and owes to him no obligation for the work he performs. It would be a "drastic curtailment of the subcontractor's rights" to read the dispute provision into the contract between the electrical subcontractor and the labor subcontractor. The Court in the Cleveland Electric case, Supra, stated that the provisions such as the one now before this court were intended to cover the quality and manner of performance, and not to govern the rights and remedies between the two subcontractors. Jack Bryant of Robinson stated that he looked to the Alpha-Continental-Ling contract, as that contract described the work Robinson was to perform in its contract with Ling, and certain portions of that contract were made

applicable expressly to Robinson. This Court finds as a matter of law that the disputes clause contained in Article XXXIX of the Alpha-Continental-Ling contract is not applicable to Robinson and that it was not necessary for Robinson to pursue administrative remedies before bringing action in this court.

Use plaintiff Robinson has requested interest in its complaint from September 24, 1962, but the Court is of the opinion that interest should be allowed only from the date of the judgment. The basis for this decision is that the lawsuit has been delayed because of the congested condition of the Court's calendar and the fact that the case was not pre-tried before the start of the trial, thus, causing much delay as there were many exhibits introduced into evidence, and many objections to the exhibits. The Court finds that the fault for these delays does not lie with either party and for that reason denies the plaintiff's prayer for interest.

Defendant Ling moved to dismiss Robinson's action at the close of all the evidence introduced in Civil No. 518, which motion has been overruled by the Court. At the close of the evidence in Civil No. 523 Robinson moved for dismissal on the ground that there was insufficient evidence to entitle plaintiff (Ling) to relief, which motion has been denied. Plaintiff moved for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, said motion

being overruled. Plaintiff Ling in Civil No. 523 moved for summary judgment, which motion is overruled by the Court.

ORDER

It is Ordered that the Clerk enter judgment in Civil No. 518 and Civil No. 523.

It is further Ordered that the Clerk serve a copy of this Opinion and Order upon all counsel of record.

Let this Order be entered forthwith,

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Supreme Court of the United States

October Term, 1968

No. 1265

ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Manufacturing Company; and ALPHA OF TEXAS, INC.; and CONTINENTAL ELECTRONICS MANUFACTURING COMPANY; and ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Systems, Inc.; and CONTINENTAL ELECTRONICS SYSTEMS, INC. and LING ELECTRIC, INC.; and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA for the Use of F. E. Robinson Co. of N.C., Inc. and F. E. Robinson Co. of N.C., Inc.,

Respondents.

LING ELECTRIC, INC.,

Petitioner,

v.

FEDERAL INSURANCE CO.,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN H. ANDERSON
806 Wachovia Bldg.
Raleigh, N. C. 27602

RAY RANKIN
509 Law Building
Charlotte, N. C. 28202

Attorneys for Respondents

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Supreme Court of the United States

October Term, 1968

No. 1265

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Respondents.

LING ELECTRIC, INC.,

Petitioner,

v.

FEDERAL INSURANCE CO.,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents pray that this Court deny the Petition for a Writ of Certiorari.

THE OPINIONS BELOW

Ling Electric, Inc. v. *Federal Insurance Co.*, 406 F.2d 561 (4th Cir. 1969) has now been published. The remaining cases are cited in the petition.

COMMENTS ON PETITIONERS' QUESTIONS

Petitioners' questions contain implications and assumptions contrary to the fact findings, and in most instances are contorted and misleading.

1. Petitioners' Question 1 (a) erroneously assumes that the labor subcontractor had a duty to await payment for work already performed until prime contractor Alpha obtained Government approval of its charges for the changes and (b) disregards Ling's repudiation of the contract on September 18, 1962.

2. Petitioners' Question 2 can relate only to a provision in the contract between prime contractor and electrical subcontractor Ling (R. 83). This contract provision can apply only to performing the work in accordance with the prime contractor's "interpretation of drawings and specifications." This does not relate to payment or any valid issue in this case, and the question erroneously implies that labor sub Robinson did not perform work in accordance with the drawings and specifications.

3. Petitioners' Question 3 inaccurately assumes that the Government found that change order work (stress cones and corona shields), in dispute at trial, was required by the original contract and therefore was not a contract change. The trial court found these changes were additions not required by the original contract, and for which change order work labor subcontractor was entitled to extra compensation (R.* 19). Furthermore, the Government acknowledged that this work was in addition to the original

* In this brief, Appendix of Appellants is cited as "R" and Appendix of Appellees is cited as "S.R.", both appendices being from Appeal No. 12,277 below. "Tr." refers to the trial transcript in Civil Action No. 518 below, and "Tr. Action 523" refers to the trial transcript in Civil Action No. 523 below.

contract when it paid prime contractor $35,784.21 in additional compensation because of labor subcontractor's performance of such work (S.R. 76, 97).

4. Petitioners' Question 4 is misleading and inaccurate in (a) implying labor subcontractor had any right to use prime contractor's name in litigating any dispute with the Government, (b) implying that there was a decision of the Government contracting officer adverse to labor subcontractor from which labor subcontractor could or should appeal, (c) failing to mention petitioner electrical subcontractor waiving alleged rights to administrative remedies by filing suit against labor subcontractor's surety, and (d) failing to mention that petitioners waived any alleged rights to administrative remedies by failing to raise the question of administrative remedies until three years after the pleadings were filed and until after trial testimony had commenced.

5. Petitioners' Question 5 was not raised below, and was raised for the first time in these cases in the petition for writ, and therefore should not be considered by this Court. More importantly, Question 5 is inaccurate in stating that "the principal was held liable for . . . work done by the principal." Question 5 disregards that the Court found that Ling breached and repudiated its contract with Robinson, thereby releasing Robinson's surety. Therefore, Question 5 has no factual basis.

STATEMENT OF THE CASE

Preamble

Petitioners' Statement of the Case omits critical facts, largely ignores the Findings of Fact below, states so-called facts in direct conflict with the Findings, and only by im-

plication challenges most of the Findings without presenting the evidence on both sides of the matter.

A counterstatement of the case is therefore necessary.

Summary of Statement of the Case

The case is simple, and may be summarized as follows. Respondent Robinson was performing work as a labor subcontractor on a Government project under contract with petitioner electrical subcontractor, Ling. Ling was substantially in arrears in its payments to Robinson; Robinson repeatedly requested payment, and informed Ling that Robinson was running out of money. In defiance of express and implied agreements, on September 18, 1962, Ling informed Robinson that *Ling would not pay Robinson anything for much of the work Robinson had performed*—and that Ling would not pay Robinson anything more on a great deal of the work Robinson had performed until the Government or prime contractor, Alpha-Continental, approved. The Trial Court concluded that this "refusal amounts to a repudiation of the contract by Ling" (R. 40). On September 24, 1962, Ling owed Robinson $117,169.53 for work on the project, $96,263.63 of which was past due. Robinson gave notices to Ling it was withdrawing; and on September 24, 1962, Robinson justifiably withdrew its forces from the project before completing the work.

THE STATEMENT

These consolidated cases were fully, patiently and thoroughly tried and considered by an able and scholarly trial judge, who heard witnesses and considered approximately 1300 pages of testimony and numerous exhibits. He held numerous hearings and considered extensive briefs by opposing counsel on all points presented to him. The trial

judge prepared detailed findings of fact, fully supported by citations to the trial transcript, and applied the correct rules of law to the facts.

The Fourth Circuit Court of Appeals affirmed, stating "In a close look at the record we discover no clear error in the facts as resolved and refined by him from the evidence, F. R. Civ. P. 52(a), nor do we observe mistake of law."

(A) The Parties

Petitioner prime contractor, Alpha-Continental, contracted to build radio facilities for the U.S. Information Agency, hereinafter called Government, near Greenville, N.C. for $12,173,000.

Petitioner St. Paul Fire & Marine Ins. Co. issued the bond required by the Miller Act, 40 U.S.C. 270a, guaranteeing payment to those supplying labor and materials.

Petitioner Ling subcontracted with Alpha-Continental to perform a portion of the electrical work for $1,289,500.

Respondent Robinson became Ling's labor subcontractor to furnish a portion of the labor, related payroll expenses, tools and equipment for certain electrical work on the project for $325,000.

Third party respondent Federal Insurance issued bond to Ling guaranteeing Robinson's performance.

(B) The Ling-Robinson Contract

Paragraph 1 of the Continuation Sheet of the Ling-Robinson contract "related to payment for work done under the *original* contract". (Finding R. 10) (Emphasis added). Briefly, it provided that Ling pay Robinson its gross payroll plus 10% monthly until 50% of the contract price was paid, that the parties review the actual work performed when 50% was paid with a view to releasing more money,

and that payments not exceed 95% of the total adjusted amount until the owner accepted the work.

Paragraph 7 of the Additional Provisions relates to *changes and extra work,* and provides that Robinson accept no orders for extra work or changes unless presented in writing by Ling, and that *payment* for all such extra work and changes be governed by separate written agreement (Finding R. 11). "This provision was waived by the request of Ling to perform the work without written orders and by the payments of the amounts claimed during the early period of the contract without any objection by Ling as to the procedure involved." (Finding R. 16).

"As there was not an express provision covering the payment for this extra work, it would appear that Robinson should have been paid for this work within a reasonable time after the invoices had been delivered to Ling." (Finding R. 24).

The Trial Court concluded that "there was not an express agreement between Ling and Robinson as to the value of the change order work, the speed-up work and the extra work or the time in which payment would become due", and that "the law implies a promise by Ling to pay Robinson . . . a reasonable amount within a reasonable time." (R. 39).

"The contract . . . did not provide for approval by the government or Alpha-Continental or payment by them before Ling was obligated to pay Robinson." (Finding R. 12) (Emphasis added).

The Ling-Robinson contract (R. 113-127) did not contain any "disputes" provisions, although an article entitled "Disputes" appears in the Ling-Alpha-Continental contract (R. 106-107).

The Ling-Robinson contract provided that Robinson was "to furnish labor and related expenses as described in Section 3 . . . in accordance with all terms, covenants and con-

ditions" of the Ling-Alpha-Continental contract (R. 11, 113-114). However, the Trial Court concluded that this latter provision was "intended to cover the *manner and quality of performance,* and not to govern rights and remedies between the two subcontractors. . . . [T]he *disputes clause* . . . of the Alpha-Continental-Ling contract is not applicable to Robinson. . . ." (R. 49) (Emphasis added).

Section 01 of the Ling-Alpha-Continental contract (R. 74) *excluded* "steel to steel" bonding (brazing) and grounding, except for the steel-to-steel bonding and grounding required of electricians under Section 301 of that contract (R. 75). These Sections 01 and 301 also appear in the Ling-Robinson contract (R. 114, 13). Robinson performed that steel to steel bonding which was required of it under Section 301 (Finding R. 23, 214). However, Ling requested Robinson to perform steel-to-steel bonding (brazing) which Robinson was not obligated to perform (Finding R. 22, 24, 215; S.R. 26, 51-52). "This brazing work was undertaken by Robinson at the request of Ling (Tr. 101, 333) and pursuant to Ling's agreement to pay Robinson additional compensation." (Finding. R. 22, 217).

In late 1961 and early 1962, the progress of the work on the project was three to four months behind schedule, "not due to any fault of Robinson" (Finding R. 25). In March 1962, the Government asked Alpha-Continental for cost estimates to speed up the work, and Alpha-Continental asked Ling for estimates of its costs. "At Ling's request Robinson submitted an estimate of $69,797.98 as the additional cost to put the speed up program into effect. Ling instructed Robinson to put the speed up program into effect immediately, stating that Alpha-Continental had said it should be put into effect." (Finding R. 26). "Although Ling ordered the speed-up into effect after receiving Robinson's estimate, the evidence does not show that Ling and Robin-

son specifically agreed upon the price that would be paid to Robinson for this work. Ling and Alpha-Continental knew that Robinson was performing a vast amount of speed-up work and that Robinson expected to be paid." (Finding R. 26). "On September 18, 1962, Robinson was informed that the speed-up work would not be paid for." (Finding R. 27).

Although Robinson's cost of performing the speed-up work was $105,724 (S.R. 44-46), the Trial Court found that "the reasonable value of the speed-up work performed by Robinson on the project at the direction of Ling and for the use and benefit of Ling and Alpha-Continental between March and the time Robinson left the job was $69,797.98. . . ." (Finding R. 28, 363-365).

(C) Ling's Payment Practices

"In the beginning, Ling paid monthly Robinson's direct labor payroll . . . plus 10% thereof, said payroll covering work performed under the contract, change orders, and orders to speed-up (accelerate), but these payments were changed to bi-weekly and were so continued into June 1962. *Ling paid for extra work as invoiced,* sometimes by separate check and sometimes by adding the invoiced amount for extra work to the monthly and bi-weekly payments, *although no payment at all was made for many invoiced extra work items.*" (Finding R. 16) (Emphasis added). "In June 1962, Ling notified Robinson that Ling would not pay Robinson's regular payroll billings at the end of June 1962. . . ." (Finding R. 31).

"Robinson rendered invoices to Ling weekly for the brazing work and these invoices were paid regularly by Ling until the latter part of October 1961 (Tr. 103, 112-117) at which time Ling had paid about $6,000 to Robinson

for brazing work as extra work." (Finding R. 23). Following this, Robinson continued performing said brazing work, at Ling's direction, to the extent of $19,007.67 and "Ling subsequently refused to pay Robinson. . . ." (Finding R. 23).

"During the period from the end of June 1962 until September 24, 1962, Robinson received checks from Ling. The amounts of these checks were credited to the base contract, speed-up, extra work and change orders. Some of these checks did not carry any notation as to which account the proceeds were to be credited." (Finding R. 33).

(D) Robinson's Requests for Payments

Robinson objected to Ling discontinuing making the regular payroll payments in June, 1962 (Finding R. 31).

"During the course of the work Robinson . . . submitted invoices to Ling for extra work . . . in the amount of $68,962.51. . . . Ling paid Robinson $35,136.78 (Tr. 94) on these invoices. . . ." (Finding R. 21).

"Robinson rendered invoices to Ling weekly for the brazing work . . . Robinson continued its efforts to collect the invoices for this work. . . ." (Findings R. 22-23).

Robinson had performed change order work in the amount of $76,798.51 and had requested payment, but Ling paid Robinson only $25,948.61 of this amount (Finding R. 17).

"On August 17, 1962 Robinson was short of funds and informed Ling that it might be compelled to leave the job because it was running out of money (Tr. 199-200). During this time Robinson requested additional payments from Ling. . . ." (Finding R. 33). Ling's president acknowledged that it knew on that date that Robinson's funds might last no longer than two more weeks (S.R. 70-71).

On August 22, 1962, Mr. Bryant, Robinson's president, wrote Ling requesting payment against the backlog of change order work, and stated "I am borrowing to the absolute limit of my credit, both Company and personal. . . ." (R. 452). "During the summer of 1962, after Ling had ceased making payments to Robinson based on payroll, Robinson borrowed funds to the extent of its credit and Jack Bryant, Robinson's president, borrowed $50,000.00 personally for the benefit of" Robinson to meet payroll obligations (Finding R. 33, S.R. 69).

In September 1962, Robinson was refused permission to attend a meeting between Ling and Alpha-Continental at which Robinson's claims for payment were discussed (Finding R. 33).

Robinson ". . . made numerous requests to ascertain the status of the speed-up work, said requests extending into September 1962." (Finding R. 27). Robinson repeatedly contacted Ling to determine how Ling would pay for the speed-up work (S.R. 46).

(E) The Alleged July 11, 1962 Agreement

"Ling contends that at this meeting [July 11, 1962] Robinson's representatives agreed that no further payments would be made by Ling to Robinson for these outstanding disputed extra work invoices unless and until Ling succeeded in receiving some of the cost from Alpha-Continental or the Government. Robinson denied making any such agreement. In support of its contentions, Ling introduced its letter to Robinson dated July 15, 1962 purporting to confirm the agreement (defendant's exhibit 3-a-1). This letter stated the alleged agreement between the parties. On July 19, 1962 Robinson answered Ling's letter of July 15, 1962 in which it denied making the alleged agreement recited in

the Ling letter. Thereafter, Robinson received Ling's check dated July 30, 1962 for $17,000 bearing no notation as to what it covered and without any letter of transmittal. The Court finds as a fact that there was not an agreement between Robinson and Ling that Robinson would be paid for disputed extra work invoices only if and until Ling received payment from the Government or Alpha-Continental. The only agreement was that certain items would not be submitted until later in the job. This agreement was made during the early stages of the project. This agreement was breached by Ling when it informed Robinson [September 18, 1962] that it would not be paid until the Government and/or Alpha-Continental had authorized payment for the changes. . . . [T]here was never any agreement between Alpha-Continental, Ling and Robinson that Robinson should await approval of the Government and/or Alpha-Continental before performing or being paid for performing change order work, extra work, or speedup work." (Findings R. 31-32) (Bracketed material added.) The Trial Court did not find that Ling furnished any consideration to support the alleged July 11, 1962 agreement.

(F) Ling's September 18, 1962 Repudiation

"On September 18, 1962, Ling notified Robinson that at the Dallas meeting between Ling and Alpha-Continental at which meeting Robinson was not represented, a decision had been reached not to pay Robinson any more money for speed-up, for steel to steel bonding, or for the other extra work that was still in dispute, and not to pay Robinson the balance for the change order work, and that the change order work would not be added to the contract until such time as the Government or Alpha-Continental approved

(Tr. 145-146, 314). There is not any evidence before this Court that Robinson ever consented to these new terms being imposed." (Finding R. 33-34, Tr. 105-106 in Action 523).

This was one of the breaches which the Trial Court concluded amounted to a repudiation of the contract by Ling and justified Robinson in refusing to continue work on the project (R. 40-41).

An examination of the status of account between Ling and Robinson just six days later shows that Ling was thereby attempting to foreclose or unjustifiably delay Robinson from collecting more than $100,000 (R. 29-30, 22-23, 17).

(G) Ling's Breaches Justifying Robinson's Withdrawal

"The defendant Ling committed a material and substantial breach of its agreement with Robinson in failing to pay Robinson substantial sums of money which were due and owing to Robinson as of September 24, 1962, the date Robinson left the job." (R. 38).

"The first breach was that the defendant Ling failed and neglected to bring the periodic payments up to date. The second was the failure to pay for a substantial portion of the work performed as a result of change orders, extra work and speed-up. The third breach was the communication to the plaintiff of defendant's decision not to pay plaintiff the large sum for orders to speed-up the progress of the project, extra work orders, and change orders, which refusal amounts to a repudiation of the contract by Ling. The Court has found that the defendants did fail to keep the periodic payments up to date as called for in the contract between Ling and Robinson and that it failed to make payment for a large portion of the extra work, change orders

and speed-up, and finally that on September 18, 1962 it informed Robinson that it was not going to pay any more money for the change orders until they had been added to the base contract, and that it was not going to pay any more for the extra work and speed-up. . . . [T]here was a substantial and material breach . . . going to the very essence of the contract and justifying Robinson in refusing to continue work on the project." (R. 40-41).

(H) Status of Ling-Robinson Account September 24, 1962

The Trial Court found that on September 24, 1962, the date Robinson left the job, the reasonable value of the work performed by Robinson on the project was $499,641.05 ($515,213.58 less $15,572.51). (Findings R. 29, 30). [Although the Trial Court found $499,641.05 there was testimony that the reasonable value of the work performed by Robinson on the project was $558,305.24, and this figure was arrived at on the same mathematical basis which Robinson negotiated and bid the job with Ling (R. 178-179)].

Ling had paid Robinson $382,471.52 of the $499,641.05, leaving Ling owing Robinson a balance of $117,169.53, of which $96,263.63 was due before Robinson left the project September 24, 1962 (Finding R. 29-31, 17-18, 35, 38).

For ease in accounting, the Trial Court found (R. 30) that on September 24, 1962, Robinson had performed $299,524.58 of the base contract work, $76,798.51 in change order work, $68,962.51 in extra work and $69,927.98 in speed-up work, and deducted $15,572.53 to eliminate duplicate inclusions in the foregoing of premium time which were included in the extra work and speed-up (Finding R. 29).

Of the total of $382,471.52 Ling had paid Robinson by September 24, 1962, only $25,948.61 was toward the $76,798.51 of change order work performed (Finding R. 17); and only $35,136.78 was toward the $67,962.51 of extra

work performed (Finding R. 21). Because of Ling's above payment practices, it was not possible to separate the amounts paid toward original contract work and speed-up work (Finding R. 16, 169). However, by adding the above $25,948.61 paid for change order work and $35,136.78 paid for extra work, and deducting that sum from the total $382,471.52 paid by Ling it will be recognized that Ling could have paid no more that $321,386.13 toward the $369,456.56 in original contract plus speed-up work performed by Robinson (R. 49). Even if part of the $15,572.53 deduction to eliminate duplicate inclusions for extra work and speed-up (Finding R. 29) be applied to reduce the value of the speed-up work performed, Ling was still many thousands of dollars in arrears in its payment under the original contract plus speedup.

Petitioners mistakenly contend that it was admitted that a portion of the amounts claimed by Robinson to be due on September 24, 1962 was for costs incurred by Robinson in correcting defective work rejected by the Government inspector. The trial court dealt with a related matter at R. 35.

(I) Items of Work in Dispute at Trial

With respect to the $76,798.51 of *change order work* performed by Robinson, only seven items of this work totalling $38,362.47 were in dispute at trial (Finding R. 17-18; S.R. 59-61). These involved switchboards, corona shields and fireproofing substituted cable (R. 17, 18). The Trial Court found that Robinson had performed all of the foregoing seven items of change order work, and that the charge of $38,362.47 therefor was reasonable (R. 17-20).

With respect to the $68,962.51 of *extra work* performed by Robinson, only $21,851.06 of this work was in dispute at trial (Finding R. 21). $19,007.67 of the $21,851.06 in-

volved invoices for brazing (steel to steel bonding) (Finding R. 22). ". . . [T]he extra work for brazing . . . was not required by Robinson's base contract with Ling. . . ." (Finding R. 24). It was undertaken at Ling's request and ". . . pursuant to Ling's agreement to pay Robinson additional compensation." (Finding R. 22, 217). "Robinson rendered invoices to Ling weekly for the brazing work, and these were paid regularly by Ling until the latter part of October 1961 (Tr. 103, 112-117, 488) at which time Ling had paid about $6,000.00 to Robinson for brazing work as extra work (Tr. 369)." (Finding R. 22-23). The remaining $2,843.39 in dispute was ". . . the last sixteen items of extra work on plaintiff's Exhibit J covering miscellaneous items of extra work performed by Robinson at Ling's request. . . ." (Finding R. 23-24).

The speed-up program was the only other item of additional work in dispute at the trial (S.R. 59-61). The Trial Court found that the reasonable value of the speed-up work performed by Robinson was $69,797.98, and that Ling ordered this work into effect after receiving Robinson's estimate of that amount (Findings R. 26, 28). However, there was testimony that it actually cost Robinson $105,724 to perform the speed-up program (S.R. 44-45).

The speed-up program was of value to Ling and Alpha-Continental. On March 23, 1962, Ling submitted to Alpha-Continental its estimate of the reasonable cost of additional labor to speed-up the electrical work on the project, increasing such cost from Robinson's estimate of $69,797.98 to $381,989.29 (S.R. 62-64, 91-92). Also, on April 26, 1962, Alpha-Continental promised the Government to accelerate the work in consideration of the Government extending the completion date for the project, extending the date after which $1,500 per day of liquidated damages for late completion would commence, and offering Alpha $150,000

bonus for early completion. (Finding R. 27, 268; S.R. 58, 102-106). Alpha-Continental's general manager testified that Alpha was paid an incentive bonus by the Government for early completion (S.R. 72-73).

The Ling and Robinson officers and executives, in their testimony at the trial, agreed that the foregoing items of change orders, extra work and speed-up work were the only items of work in dispute at trial between the parties for which Robinson claimed compensation in addition to base contract work (S.R. 59-61, 3-5, 11-19, 22-23, 28, 77-79, 88-90; R. 17, 21, 22, 301-302, 365).

The reasonable value of the work performed by Robinson under the original contract was in dispute, and was found by the Trial Court to be $299,524.58, which was arrived at by deducting from the original contract price ($325,000) the value ($25,475.42) of completing the uncompleted portion of the work described in the base contract (Findings R. 17, 29; S.R. 5, 56-57). Ling's superintendent "testified that the value of completing Robinson's uncompleted work was approximately $70,000", but the Trial Court chose instead to rely on computations of $25,475.52 by Robinson's president and project engineer (Findings R. 16, 17).

(J) Robinson's Withdrawal and Notice

"On Saturday morning, September 22, 1962, Robinson, through its directors and president decided to withdraw its forces from the job (Tr. 146-147, 96-98) and on September 22, 1962 Robinson mailed a notice (Plaintiff's Exhibit N) to Ling that it was withdrawing its forces from the job (Tr. 146-147). On Monday morning September 24, 1962 Robinson paid off its workers on the job, discharged them, and notified Ling's representative on the job site of its withdrawal. The decision and action by Robinson described

above was made and taken by Robinson solely on its own initiative and solely for the reasons which it and its counsel believed necessary and justified. . . ." (Finding R. 34). The parties stipulated regarding the notice of withdrawal (R. 150).

(K) Miller Act Notice and Suit

"The Court finds as a fact that Robnson did demand payment of $158,187.48 from Alpha-Continental, Alpha-Continental's surety and Ling by registered letter mailed October 29, 1962 (Def. Ex. L-P-2) for unpaid labor performed and related expenses furnished in connection with the Government project. . . ." (R. 2). "Defendants have admitted that they received this notice and that the notice was sent within ninety days after the work had been performed on the project." (R. 37).

Robinson's suit was filed within one year after the day on which Robinson furnished its last labor for the project (R. 37).

SUMMARY OF REASONS FOR DENYING CERTIORARI

1. No valid issues of public importance are presented by petitioners, and the only real issue is one of money damages between the parties.

2. The decisions below are not in conflict with a decision of another court of appeals or of this Court.

3. The decisions below depended largely upon findings of fact, none of which are "clearly erroneous", but are fully supported by the evidence.

4. No novel question of federal law is presented, and this is a "run of the mine" Miller Act case in which well settled rules of law were properly applied to the facts.

5. Each of the Questions Presented by petitioners implies or assumes "facts" that have not been found, or "facts" in direct conflict with the findings of fact below.

6. Far from placing "in jeopardy all government contracting procedures", the decisions below merely interpreted the written Ling-Robinson contract, and applied the well settled principles of implied contract to matters not expressed in the written contract.

7. The decision below does not impose any unusual obligations on parties. It simply holds that when the written contract provides that payment for extra work and changes shall be governed by separate written agreement between the parties, and the parties by course of conduct do not enter into such separate agreements, the party performing the extra work and changes at the demand of the other party should be paid a reasonable amount for such work within a reasonable time.

8. Robinson's right to abandon work on the project was not based on any unilateral decision that it was due money for work outside the scope of the contract, but arose from Ling's repudiation of the contract on September 18, 1962, and Ling's failure to pay Robinson substantial sums of money then past due, as found by the trial Court (R. 40-41).

ARGUMENT FOR DENYING CERTIORARI

Respondents' Main Argument

Respondents' main arguments are that the trial Court's Findings of Fact are all supported by substantial evidence and are not "clearly erroneous", and that the correct and settled rules of law were applied to the facts as found.

Robinson furnished labor as a labor sub-contractor to respondent Ling on a Government project over a long period

of time. Ling failed to pay a large amount of money which was due and owing to plaintiff on account of this work. Robinson informed Ling that Robinson would be financially unable to continue the work unless paid. 40 U.S.C. 276(a) requires contractors on Government projects to pay their employees not less often than weekly. Robinson had borrowed to its credit limit to meet these payrolls, after Ling failed to pay money due Robinson.

On September 18, 1962, Ling repudiated the contract with Robinson by informing Robinson that Ling would not pay Robinson for much of the work Robinson had performed, and by informing Robinson that Ling would not pay Robinson for much additional work Robinson had performed until such time as the Government or prime contractor approved.

Robinson notified Ling that Robinson was being forced to withdraw its forces from the project, and charged Ling with violation of the contract for failure of Ling to meet its financial obligations (R. 362).

On September 24, 1962, Robinson justifiably withdrew its forces from the project before completely performing the work specified in the contract (R. 150). When Robinson withdrew, Ling was in breach of the contract because of failure to pay large sums due and owing Robinson.

The Trial Court properly awarded Robinson the quantum meruit value of the work it had performed, and the Fourth Circuit Court affirmed.

Answers to Petitioners' Questions Presented

(A) ANSWERS TO QUESTION 1

The fundamental fallacy of Petitioners' position in Question 1 is the assumption that a labor subcontractor is not entitled to payment for the performance of work re-

quired by changes to the original contract until the prime contractor's bill to the Government for such labor and materials has been approved by the Government contracting officer.

Obviously, labor subcontractor Robinson's right to payment must be governed by the contract between Robinson and electrical subcontractor Ling. That contract has a special provision relating to payment for such work: "Payment to Labor Sub Contractor by Sub Contractor for any and all such extra work and changes shall be governed by separate agreement in writing . . ." (R. 118).

It developed that "Ling insisted that Robinson either perform these changes and extra work without a written agreement or leave the job." (R. 15). The trial Court found that the parties waived the requirement for written orders for changes and extra work (R. 16).

The trial Court concluded that there was not an express agreement between Ling and Robinson as to the value of the change order work, the speed-up work and the extra work or the time in which payment would become due (R. 39). Under these conditions, the trial Court concluded that the law implies a promise by Ling to Robinson to pay a reasonable amount within a reasonable time for the work performed (R. 39).

The trial Court found as a fact that there was never any agreement that Robinson should await approval by the Government and/or Alpha Continental before performing or being paid for change order work, extra work or speed-up work (R. 32).

Petitioners have not referred this Court to any contract provision which would postpone Ling's obligation to pay Robinson for change order work until the Government approved Alpha's bill therefor.

Moreover, it has been held that any such agreement would be contrary to the public policy of the Miller Act and unenforceable, *U.S.* v. *Holloway Co.*, 126 F.Supp. 347 (D.N. Mex. 1954).

* * *

A second fallacy in Question 1 is Petitioners' disregard of the fact that Robinson's right to discontinue work on the project arose from Ling's breach of the contract by failing to pay large sums when due, and Ling's repudiation of the contract by declaring it would *never* pay large sums which the Court subsequently found was due at that time, and would not pay other large sums until the Government or Alpha approved (R. 33-34, 40-41).

* * *

Question 1 implies that Respondent was not entitled to a recovery on quantum meruit.

It is well settled law that respondent Robinson was entitled to recover on quantum meruit under the facts of this case, as discussed by the trial Court at R. 43-46, and as further discussed in detail at pages 25-31 of respondent Robinson's brief to the Fourth Circuit in Appeal No. 12,277.

(B) Answer to Question 2

There is really no valid basis in this case for the Court to consider Petitioners' Question 2.

As already stated, this question can relate only to subparagraph (b) of Article VIII of the Ling-Alpha contract (R. 83). This article is entitled "Direction and Control", and subparagraph (b) merely provides that the work will be performed in accordance with Alpha's "interpretation of drawings and specifications".

There has been no contention that Robinson's work failed to conform to the drawings and specifications or to Alpha's interpretation of the drawings and specifications.

Article VIII obviously has nothing to do with anyone's right to receive payment for work performed, as Article IV of that contract is entitled "Payment" (R. 78), and governs payment to Ling, and as payment to Robinson is governed by the specific provisions of the Ling-Robinson contract (R. 115, 118, 125).

(c) Answer to Question 3

Question 3 does not fairly arise in this case, because there was no finding that the disputed change order work (stress cones and corona shields) was found by the Government to be included in the work required to be performed under the original contract.

Stress cones and corona shields were not required to be installed by Robinson under the original specifications or contract for the following reasons.

The trial Court found that (R. 19), the installation of corona shields and stress cones on certain cable ". . . was required by the government's changing the specifications from the use of three conductor unshielded cable to single conductor shielded cable on August 1, 1961. (Tr. 90, 841-843)."

The Government acknowledged that this work was in addition to the original contract when it paid Alpha $35,784.21 in additional compensation because of Robinson's performance of this work (S.R. 76, 97).

Alpha made like acknowledgement when it contended to the Government that this work was outside the original contract (S.R. 76, 100-101).

Ling agreed that this work was "not a specification requirement", listing the very items found by the Court, and without any question as to the prices billed by Robinson (R. 360; S.R. 16-19). Also, Ling billed Alpha additionally for this work (R. 401-409). Moreover, by later attempting to

credit Robinson on Ling's books and the cross-action against Federal Insurance for a lesser amount for this work, Ling acknowledged that this work was outside the original contract specifications (R. 20, 18).

In short, Robinson performed the above change order work and Robinson was properly awarded compensation for this work, by the Courts below. Moreover, the Government awarded Alpha additional compensation for such work.

(D) ANSWER TO QUESTION 4

The inaccuracies and misleading aspects inherent in Question 4 are briefly described under the foregoing Comments On Petitioners' Questions.

In this question petitioners are alluding to Article 39 (R. 106-107) of the Ling-Alpha contract. This article does not appear in the Ling Robinson contract, and the trial Court concluded that the clause is not applicable to Robinson, citing cases (R. 47-49).

Article 39(a) provides for arbitration between Alpha and Ling; arbitration is not relevant to Question 4 as presented.

Article 39(b) provides that decision of a Government contracting officer, disposing of a question of fact between Ling and Alpha shall be binding upon them, and that Ling may use Alpha's name to appeal such decision if Alpha elects not to appeal.

There is no evidence of "any decision by the contracting officer . . . disposing of a question of fact which is in dispute between the parties hereto . . ." (Alpha and Ling) (R. 107), so there was no evidence of a decision from which Robinson could appeal, even if Robinson were entitled to appeal.

Moreover, Robinson had no rights or responsibilities under Article 39(b) because Alpha had neither agreed to lend Robinson Alpha's name for appeal, nor had Alpha agreed that Ling could lend Robinson Alpha's name for appeal.

Jurisdiction of the Court is conferred by the Miller Act, 40 U.S.C. 270.

Moreover, Ling waived any alleged rights to compel Robinson to pursue so-called administrative remedies by filing suit against Federal Insurance, Robinson's surety. See *U.S.* v. *Bregman Construction Corp.*, 256 F.2d 851 (7th Cir. 1958).

Petitioners waived any alleged rights to compel Robinson to pursue so-called administrative remedies by failing to raise the question of administrative remedies until three years after the pleadings had been filed and until after trial testimony had commenced. See *Radiator Specialty Co.* v. *Cannon Mills*, 97 F.2d 318, 319 (4th Cir. 1938). Even at that late date, defendants moved to dismiss rather than moving to stay proceedings. By that date, Alpha had finally settled with the Government, foreclosing anyone's right of pursuing administrative remedies with the Government.

* * *

Under any view, Question 4 could involve only Robinson's claim for compensation for stress cone and corona shield change order work. This has been treated fully in the above answer to Question 3.

(E) Answer to Question 5

Question 5 was not presented or considered in the courts below and should not be considered by this Court.

Question 5 has no factual basis. It is based on the erroneous assumption that moneys charged back to Robinson

was "on work done by" Robinson, and it erroneously implies that Robinson did something wrong.

On the contrary, the trial Court allowed subcontractor Ling to recover from labor subcontractor Robinson's surety $3,926.54 for minor purchases of goods and services by Robinson from prime contractor Alpha, which Alpha back charged and deducted from Alpha's final settlement with Ling after the present litigation commenced (R. 35). These goods and service items appear at R. 439-441, and are for such things as unloading equipment, supplies purchased, and use of Alpha's radio.

The fact that Ling, in essence, purchased from Alpha a $3,926.54 account receivable on which Robinson was debtor, long after Ling's breaches and repudiation of the Ling-Robinson contract and even after the present litigation commenced, cannot revoke the release of Robinson's surety from its performance bond. That release occurred when Robinson justifiably left the job. As concluded by the courts below, Robinson's right to terminate work on the project arose from Ling's wrongful breach and repudiation of its obligations to Robinson.

No Conflict is Presented

There is no conflict between the present case and any of the circuit court cases cited by petitioners.

Jefferson Construction Co. v. *U.S.*, 283 F.2d 265 (1st Cir. 1960) held that it was error for the District Court to grant *summary judgment* when there was no general allegation of performance of the terms of the contract ". . . or that its conditions had *been met or excused.*" (p. 266) (Emphasis added). In the present case, Ling's breaches and repudiation furnished ample excuse for not completing performance.

In *St. Paul-Mercury Indemnity Co.* v. *U.S.*, 238 F.2d 917, 924 (10th Cir. 1956), the sub was allowed to recover on the Miller Act bond "the reasonable value of the basic contract requirements, change orders and extras." The sub was not allowed to recover on the bond $35,762.37 for miscellaneous services, because "the evidence is insuficient to show that it was for labor and materials used in the prosecution of the contract work. . . ." In the present case, Robinson was allowed to recover only for labor and materials used in the prosecution of the work on the project, and thus there is no conflict presented. As in the St. Paul case, Robinson was properly allowed to recover on the bond for basic contract work, change orders and extras.

U.S. v. *United Enterprises*, 226 F.2d 359 (5th Cir. 1955), is distinguishable on the facts from the present case, because in the present case no rulings by the governmental contracting officer adverse to Robinson's claim were introduced into evidence, and the United Enterprises case is interpreting specific contract provisions not here pertinent.

As in *Wisconsin Electric Co.* v. *Dunmore Co.*, 282 U.S. 813 (1931), "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law," and the petition for certiorari should be denied.

Petitioners' Attempt to Upset Fact Findings

Petitioners' entire case rests on the foundation that this Court should upset fact findings by the District Court which were examined and accepted by the Court of Appeals.

F.R. Civ. P. 52(a) provides that ". . . findings of fact shall not be set aside unless *clearly erroneous* . . . ." (Emphasis added.) This Court follows the "clearly erroneous" requirement, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949).

Also, this Court has the additional requirement that it must be a *strong* case for it to set aside findings when made by a district court, and examined and accepted by a court of appeals,, *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944).

Follows Established Case Law

The present case follows established and well settled case law. *U.S.* v. *Zara Contracting Co.*, 146 F.2d 606 (2nd Cir. 1944), and *St. Paul-Mercury Indemnity Co.* v. *U.S.*, *supra*, are quite similar to the present case.

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

JOHN H. ANDERSON
806 Wachovia Bldg.
Raleigh, N. C. 27602

RAY RANKIN
509 Law Building
Charlotte, N. C. 28202

Attorneys for Respondents